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1339

IN THE

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United States Circuit Court of Appeals For the Ninth Circuit

NAMPA & MERIDIAN IRRIGATION DISTRICT,

Appellant,

vs.

J. B. BOND, Project Manager of Boise Project
of the United States Reclamation Service,
Defendant,


PAYETTE-BOISE WATER USERS' ASSOCIATION, Ltd.,

Intervenor.

Appellees.

Transcript of the Record

*Upon Appeal from the United States District Court
for the District of Idaho, Southern Division.*



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NAMES AND ADDRESSES OF ATTORNEYS
OF RECORD

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*In the District Court of the United States in and for
the District of Idaho, Southern Division.*

NAMPA & MERIDIAN IRRIGATION DIS-
TRICT,

Complainant,

vs.

J. B. BOND, Project Manager of Boise Project
of the United States Reclamation Service,
Defendant,

No. 983.

BILL OF COMPLAINT.

The Complainant alleges:

1. That the plaintiff is a corporation duly organized, existing and doing business under the laws of the State of Idaho relating to Irrigation Districts.

2. That the Defendant, J. B. Bond, is the duly appointed, authorized and acting Project Manager of what is known as the Boise Project of the United States Reclamation Service and as such has executive charge and control over the delivery of water from said Boise Project. That said Boise Project is an irrigation system constructed by the United States and situated chiefly in the Counties of Ada and Canyon in the State of Idaho.

3. That the said Plaintiff Irrigation District contains about 65,000 acres of irrigated land ly-

ing in Ada and Canyon Counties in Idaho, of which about 40,000 acres receives its entire water supply from that certain irrigation system constructed by the United States and known as the Government irrigation system of the Boise Project, and the remainder thereof is supplied mainly out of the old water rights of the District supplemented by a certain amount of stored water furnished by the United States out of the Arrowrock Reservoir of the said Boise Project as provided in that certain contract between the United States and the District hereinafter referred to.

4. That the said Forty Thousand (40,000) acres of land irrigated entirely with water from the Government irrigation system of the Boise Project is known and commonly referred to as the project lands of the District, and the lands irrigated mainly out of the old water rights of the District are commonly known and referred to as the old water right lands of the District.

5. That pursuant to the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act, and acts of Congress supplementary thereto or amendatory thereof, the United States, acting through the Secretary of the Interior, has authorized and caused to be constructed that certain irrigation project located in the States of Idaho and Oregon known as the Boise Project. That the lands irrigated entirely with

water supplied from the irrigation works of the said Boise Project about four-fourteenths (4/14ths) are located in the Nampa & Meridian Irrigation District, and about ten-fourteenths (10/14ths) outside of the District.

6. That on or about June 1, 1915, the Defendant, Nampa & Meridian Irrigation District, entered into contract with the United States for the construction of a drainage system in the District, purchase of supplemental storage water rights from Arrowrock Reservoir for the old water right lands of the District, and full water rights for the project lands of the District, a copy of which contract is hereto attached, marked Exhibit "A" and made a part hereof, and thereafter entered into a supplemental contract with the United States, a copy of which is hereto attached, marked Exhibit "B", and made a part hereof.

7. That the said contracts were duly authorized by the electors of the District at elections held for that purpose, in the manner and in full compliance with the State Law and in like manner as in the case of a bond issue, and the said contracts and all proceedings in connection therewith were duly confirmed by decrees of the District Court in the manner provided in the State Statute. That the benefits of said contracts were duly apportioned by the directors of the District and the apportionment

thereof confirmed by the decrees of the District Court as provided in the State Statutes.

8. That Section 12 of the said contract of June 1, 1915, provided among other things:

“The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States, and paid over by the District to the United States, and upon notice from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge.”

9. That the drainage system provided for in the said contract between the United States and the Defendant, Nampa & Meridian Irrigation District, has been constructed by the United States.

10. That as a result of irrigation from the said irrigation system of the Boise Project the water table is rapidly rising under portions of the Boise Project outside of the Nampa & Meridian Irrigation District, particularly in the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project, and that in the opinion of the officials of the United States Reclamation Service it has become necessary to construct a drainage system in said portions of the project in order to

prevent the lands thereof from being ruined by seepage and alkali. That the Secretary of the Interior has caused to be made surveys and investigations of a proposed drainage system for said lands and has caused investigations to be made of the seepage and ground water conditions under said portions of the project, from which it appears that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided, said lands will suffer irreparable injury from seepage and water-logging.

That the Secretary of the Interior has approved the said proposed drainage system and has authorized the construction thereof as a part of the operation and maintenance work of the Boise Project with funds to be collected for that purpose from the water users as an operation and maintenance charge.

11. That for the purpose of providing the necessary funds for the construction of said drainage system as aforesaid the Secretary of the Interior on February 15, 1921, issued a public notice, copy of which is hereto attached and made a part hereof, and marked Exhibit "C".

12. That this Plaintiff has duly paid all operation and maintenance charges claimed by the Hon. Secretary of the Interior under Par. (a) of said

notice marked Exhibit "C", to this date, and that the payments so made by plaintiff to the United States fully re-imbursed the United States for all maintenance and operation expenses actually incurred on account of the Project lands of the United States within the Plaintiff District and constituted full payment of all operation and maintenance charges for which Plaintiff or the said Project Lands within the Plaintiff District were or are liable under the provisions of the said contracts between Plaintiff and the United States, referred to as Exhibits "A" and "B" unless it shall be held that under the terms of said contracts Plaintiff is liable for a pro rata part of the cost of construction of the drainage works referred to in Par. 10 hereof.

13. Plaintiff alleges that under Par. (b) of the said notice marked Exhibit "C", the Honorable Secretary of the Interior demanded of the Plaintiff on or about April 1, 1921, payment of 50 cents per irrigable acre for the said Project Lands within the Plaintiff District, for use by the said United States in constructing the said drainage works referred to in Par. 10 and 11 hereof, which payment Plaintiff has at all times refused to make on the ground that neither Plaintiff nor the Project Lands with the Plaintiff District were liable therefor under said contract; that the construction of said drainage works was not an operation or maintenance charge as contemplated in said contracts but was in

fact a construction charge for the benefit of lands outside the Plaintiff District, which the Secretary of the Interior had no jurisdiction to levy against Complainant and which Complainant had no jurisdiction to levy under the laws of Idaho against the lands within its boundaries; and that the cost of said proposed drainage works should be collected solely from the Project Lands outside of Complainant District under the certain contract, stipulation and judgment, hereinafter referred to as Exhibits

14. That on the.....day of....., 1921, there was a certain action pending in the above entitled Court wherein Payette-Boise Water Users' Association, Limited, a corporation, was Complainant, and J. B. Bond, C. C. Fisher, Charles F. Weinkauff (as the executive officers of Boise Project) Riverside Irrigation District, Pioneer Irrigation District and Nampa & Meridian Irrigation District were defendants.

That on said date a decree was entered in said action which settled and determined the issues therein as between the Complainant and the said defendants, J. B. Bond, C. C. Fisher and Charles F. Weinkauff, and which decree was based on the certain stipulation entered therein by the Complainant, Payette-Boise Water Users' Association, representing the water users from said Boise Project, whose lands were situated outside the

boundaries of the Nampa & Meridian Irrigation District and the Pioneer Irrigation District, and the Secretary of the Interior, and which stipulation is embodied in said decree as a part thereof. Complainant attaches hereto a copy of said decree as Exhibit "D", excepting therefrom the Exhibit "B" referred to in the stipulation in said decree, being entitled

That this Complainant and the said defendants therein, Pioneer Irrigation District and Riverside Irrigation District, were not parties to said stipulation nor did said decree determine any of the issues in said suit as between Complainant therein and this Complainant but that the issues in said action as between the Complainant therein and this Complainant were determined by the certain supplemental decree in said proceedings, entered therein on the, 1921, a copy of which is attached hereto as Exhibit "E".

That immediately upon the entry of said decree, the water users from Boise Project represented by the said Payette-Boise Water Users' Association, being the land owners of the Project outside of Complainant District, individually entered into the certain contract provided for in said decree and appearing therein as Exhibit "A" of the said stipulation, and thereby contracted and agreed that the Secretary of the Interior might build the said drainage works referred to in Par. 10 hereof and that

the landowner would pay the charges therefor provided in said contract.

Complainant alleges that none of the land owners receiving Project water within the Complainant District signed said contracts nor did said stipulation make provision therefor; neither has this complainant at any time consented to the same or been a party thereto.

That the Honorable Secretary of the Interior has no authority or jurisdiction to construct said works except under the said contracts of said individual land owners and with the payments made by them as provided therein.

15. Complainant alleges that no part of the said sum so demanded of Complainant by the Secretary of the Interior and for which Complainant has refused payment, has been or will be used for the maintenance or operation of the canals, reservoirs, drainage works, etc., designated in the said contracts between Complainant and the United States as the Boise Project; but that said sum is for use in the construction of new drainage works which were not contemplated or provided for in said contracts; and that Complainant has no authority or jurisdiction to incur said expense except in pursuance of a plan or contract therefor, duly approved by the vote of two-thirds of the electors of the district as provided by the laws of Idaho.

16. That Complainant has been advised by the defendant that unless said payments are made, defendant will be compelled and required to shut off the supply of water Complainant is entitled to receive from the Boise Project for the said Project lands within the boundaries of Complainant.

17. That defendant threatens and if not enjoined and restrained by the mandatory injunction of this Court will refuse to specifically perform said contract referred to herein as Exhibit "A" of this Complaint by delivering to Complainant the water supply from the Boise Project for use of Project Lands within the Complainant District as therein provided; and that the failure of defendant so to do will irreparably injure and damage this Complainant and the owners of the said lands.

18. That Complainant has no other speedy or adequate remedy in the premises.

WHEREFORE, Complainant prays that the Court adjudge and decree:

1. That neither Complainant nor any of the said Project Lands within its boundaries are liable for any part of the costs of said proposed drainage works.

2. That a mandatory writ of injunction issue requiring defendant to specifically perform said contract and deliver to Complainant the water supply therein provided for, and for such other and

further relief as to the Court shall seem meet and equitable.

HUGH E. McELROY,
Attorney for the Complainant.
Residence: Boise Idaho.

EXHIBIT "A"

Draft of July 24, 1914.

THIS AGREEMENT made this 1st day of June, 1915, between the UNITED STATES OF AMERICA, acting for this purpose by the Secretary of the Interior, under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388) known as the Reclamation Act, and acts amendatory thereof or supplementary thereto, and the Act of Congress of February 21, 1911, (36 Stat. L. 925), the party of the first part, hereinafter called the United States, and the NAMPA & MERIDIAN IRRIGATION DISTRICT, an Irrigation District organized under the laws of the State of Idaho, and located in Canyon and Ada Counties, Idaho, acting for the purposes of this contract under authority of the Title 14 of the Idaho Revised Codes, including Sections 2396, 2397, 2398, the party of the second part, hereinafter called the District—

WITNESSETH—That,

WHEREAS, the District includes within its boundaries about Twenty-four Thousand Five Hundred Fifty-seven (24,557) acres of irrigated land,

Twenty-two Thousand Six Hundred Twelve (22,612) acres of which are entitled to receive water from the District; the remainder being irrigated with water from the Settlers' and New York Canals; and whereas, the District owns and controls that certain canal known as the Ridenbaugh Canal through which water is supplied from Boise River to the lands of the District for irrigation and domestic purposes, and whereas, the natural flow of Boise River which the District is entitled to divert under its priorities and appropriations, is insufficient during the latter part of said irrigation season to furnish a complete water supply for the lands of the District, and the District desires to secure a certain amount of stored water in order to furnish its land owners and water users a more complete water supply during the low water periods of the irrigation season, and

WHEREAS, the ground water table is rising in the District and in places is already close to the surface, so that a large part of the lands of the District are likely to become permanently ruined and incapable of producing crops, or bearing any share of the expense of the District, unless a drainage system is promptly provided; and whereas, it is believed that such a drainage system will reclaim considerable areas which cannot now be cultivated successfully on account of such seepage conditions, and will check the spread of such seepage

conditions, and save other large areas which are now threatened with destruction from the same cause; and

WHEREAS, the United States is now constructing, under the provisions of the Reclamation Act, that certain irrigation project known as the Boise Project, including the Arrowrock and Deer Flat storage reservoirs, and a portion of the lands of the District have been subscribed to said project by the individual owners of such lands; and

WHEREAS, it is believed that under existing conditions the only way in which the additional water supply and drainage system required by the District can be secured promptly and at a cost which the land owners of the District can afford to pay, is by means of a contract between the District and the United States, under the provisions of the Acts of Congress of June 17, 1902 (32 Stat. 388) and February 21, 1911 (36 Stat. L., 925) and Title 14 of the Idaho Revised Codes.

NOW, THEREFORE, it is hereby agreed—

1. That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000.00). The location of the drains, to be constructed, is shown on the map attached hereto and marked Exhibit "A", it being understood that in general

drains numbered "one" on the said map will be constructed first, drains numbered "two" will be constructed next, drains numbered "three" will be constructed last, so far as said limit of expenditure will allow such work to go, such drainage system to have sufficient capacity in its main drains to carry the seepage water flowing into the District from the lands lying above the District and draining into it, as well as that originating in the District itself. The Supervising Engineer in charge of such construction shall have the right to make changes in the alignment of the drains shown on the attached map, and in grades and cross-sections, where such changes shall be found in his judgment to be necessary or desirable to increase the efficiency or economy of the system. It is understood that in case any part of the work shown on the said map shall prove unnecessary for the benefit of District lands, such part may be omitted by mutual consent of the parties hereto. It is fully understood that the United States is to expend only Five Hundred Fifty-seven Thousand Dollars (\$557,000.00), including cost of preliminary work in drainage construction for the District, under this contract, and to stop when such limit of expenditure has been reached. It is not expected that the lands of the District can be completely drained at this cost nor a drainage system extended to each farm unit, but that only a number of principal

drains will be constructed with which individual and community farm drains can be connected.

2. That for the purposes of this contract, irrigable lands in the District which are now entitled to five-eighths of a miners' inch of water or more per acre, out of the present water rights of the District, or of the Settlers' District or through ownership of stock in the New York Canal Company, are considered as old water right lands and referred to herein under that name; irrigable lands in the District which have no water right from the District or the Settlers' District, and have not been irrigated through ownership of stock in the New York Canal Company, are considered as project lands and referred to herein under that name, and irrigable tracts of land in the District which are entitled to some water from the present water rights of the District, or of the Settlers' District or through ownership of stock in the New York Canal Company, but less than five-eighth of an inch per acre, shall be considered as old water right lands to the extent of the number of acres for which the water right of such tract will provide five-eighths of an inch per acre, and project lands as to the remainder thereof.

3. That the District will pay to the United States for that portion of the above described drainage work in the District, equity chargeable to the old water right lands in the District, the sum of

Two Hundred Sixty-six Thousand Dollars (\$266,000), in the same number of annual installments not less than ten (10) and same percentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project, the first installment to be due and payable one (1) year after the day on which said Public Notice for the Boise Project is issued by the Secretary of the Interior, and one installment on the same day of each year thereafter until all installments are paid, and will use the taxing power of the District and all the powers and resources of the District to collect said sums of money and pay the same to the United States when due. The benefits of the expenditures of said sum of Two Hundred Sixty-six Thousand Dollars (\$266,000) for drainage shall be apportioned among the old water right lands of the District. No portion of said sum of Two Hundred Sixty-six Thousand Dollars (\$266,000) shall be apportioned to the project lands in the District but the balance of the said sum to be expended on drainage works in the District as provided in paragraph 1 hereof shall be charged to the general expense of the Boise Project and the project lands in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof.

4. That after the construction thereof, the District will maintain said drainage system in good serviceable condition, at its own expense, and shall charge the cost thereof to the old water right lands in the District in the proportion which the amount of construction cost chargeable to the old water right lands in the District, to-wit, Two Hundred Sixty-six Thousand Dollars (\$266,000), bears to the total construction cost, to-wit, Five Hundred Fifty-seven Thousand Dollars (\$557,000), and will charge the balance to the United States. In case the District shall fail or neglect to maintain said drainage system in good serviceable condition, the United States may maintain or repair the same and charge the cost thereof to the District, which cost the District will promptly pay.

5. The right to water developed in the drainage system herein provided for shall belong to the Boise Project and the old water right lands of the District, and be divided between said Boise Project and said old water right lands of the District in the same proportion as the cost of the drainage system herein provided, and the drains to be constructed under this contract shall be subject to use by the lands of the Boise Project whether outside or inside the District, as well as the old water right lands of the District.

6. That the District will pay to the United States the sum of Twenty-four Thousand Eight

Hundred Forty Dollars for storage capacity in Arrowrock Reservoir—a reservoir to be constructed by the United States on Boise River in Boise and Elmore Counties, Idaho, and to have a capacity of between 200,000 and 250,000 acre feet—and the United States will provide for the District that portion of the total storage capacity of Arrowrock Reservoir which Twenty-four Thousand Eight Hundred Forty Dollars is of the total cost of said reservoir, and will deliver at the downstream end of the outlets of the Arrowrock Reservoir, for the District each year after the completion of said reservoir, the same proportion of the stored water available from said reservoir at such times after three (3) days' notice from the District to the United States officer in charge, and in such quantities as the District may direct not in excess of the District's proportionate part of the available outlet capacity. The total cost of said reservoir will be determined and stated by the Secretary of the Interior in his Public Notice of the charges to be made for the Boise Project, and to include all cost and expenses of whatsoever nature or kind for the purpose of, growing out of, in connection with, or resulting from the construction of said reservoir including engineering expenses and overhead charges, and such interest, if any, as may be payable on account of advances under the provisions of the Act of Congress of June 25, 1910 (36 Stat. L. 835), or other legislation by Congress.

7. The said sum of Twenty-four Thousand Eight Hundred Forty Dollars shall be paid by the District to the United States in the same number of annual installments not less than ten (10) and same percentage of the total in each annual installment as is fixed by the Secretary of the Interior for the lands of the Boise Project in his Public Notice announcing the construction charge for the Boise Project, the first installment to be due and payable one (1) year after the day on which said Public Notice for the Boise Project is issued by the Secretary of the Interior and one installment on the same day of each year thereafter until all installments are paid; and the District will use the taxing power of the District, and all the powers and resources of the District to collect said sums of money, and pay the same to the United States when due, and will also pay each year its proportionate share of the cost of operation and maintenance of said reservoir and delivery of water therefrom, as announced by the Secretary of the Interior.

8. No interest will be charged on any of the said installments for drainage work, or stored water, or money to be paid to the United States for operation and maintenance, on account of the drainage works or stored water, until due; but any part thereof which may remain unpaid after the same is due shall bear interest from maturity until paid at ten per cent (10%) per annum, and the

United States shall not be obliged to deliver or turn out for the District any stored water while the District is in default on any of the payments herein provided to be made by the District to the United States.

9. The District agrees to distribute the amount of water delivered to it by the United States under this contract in full compliance with the provisions of said Reclamation Act of June 17, 1902, and the rules and regulations thereunder, and to use and distribute the same only upon the lands within the District, and in compliance with the provisions of Section 2 of the Act of Congress of February 21, 1911 (36 Stat. L. 925) known as the Warren Act.

10. The stored water from Arrowrock Reservoir hereinabove agreed to be purchased by the District, shall be diverted from Boise River through the canal system of the District and delivered to old water right lands in the District to supplement the water supply of such lands at times when the natural flow of Boise River is insufficient, and the benefits and cost of such stored water shall be apportioned to such lands; Provided, however, that no portion of said stored water is to be delivered and no part of the cost thereof apportioned to those old water right lands of the District to which the first priority right of the District has been allotted under the classification of lands as to priority, which has been made by the District,

it being considered that the lands having the first priority need no stored water.

11. For the project lands in the District, the United States will provide both storage capacity in the reservoirs of the United States and carrying capacity in the United States Canal System of the Boise Project, and each year after the completion of the Arrowrock Reservoir, will deliver to the District for distribution to the Project lands in the District lying under the canal system of the District, as nearly as practical, the same proportionate share per acre of the water actually available from said works of the United States, both flood water and stored water, as is provided for similar lands in the United States Boise Project, outside of the District except as otherwise provided in paragraph 12 hereof, but no more, however, than is needed for beneficial use on said land, and for the project lands in the District lying above the canal system of the District a similar water supply for the project lands in the District will be furnished directly by the United States through the laterals and canals of the United States. The water supply for the project lands in the District shall be carried through the Main Canal of the United States Boise Project, and that portion for the project lands lying under the canal of the District delivered to the District at convenient points in the District where laterals or distributing canals from the Canal System of the

United States reach or cross the canal of the District, and will there be received by the District and distributed by the District to the project lands in the District entitled to the use thereof; under the provisions of a certain contract for the distribution of water, between the parties hereto, dated April 1, 1909, it being understood that the said certain contract shall remain in effect until such time as a new contract shall be mutually agreed upon by the parties hereto, providing for a different method of distribution of water and division of the cost of distribution.

12. The District will promptly apportion to the project lands in the District a total of Three Million Three Hundred Four Thousand Five Hundred (\$3,304,500) Dollars, being a charge of Seventy-five dollars (\$75.00) per acre as the benefits under this contract to said lands; provided, however, that if the building charge per acre announced by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project, is less than Seventy-five dollars (\$75.00) per acre, then the assessment of benefits against the project lands in the District shall be reduced to the same amount per acre as is announced by the Secretary of the Interior for the similar lands of the Boise Project, and the District will collect the sums so apportioned to such project lands in the District and pay the same to the United States in the same number

of annual installments not less than ten (10) and same schedule of graduated payments as is fixed by the Secretary of the Interior in his Public Notices for similar lands of the Boise Project outside of the District. Provided, that should the construction charge per acre announced by the Secretary of the Interior, for the Boise Project for a full water right, be in excess of Seventy-five Dollars (\$75.00) per acre of irrigable lands, the benefits to be assessed to the project lands in the District under this contract from the said project lands for the payment to the United States of the construction charge, shall nevertheless be only Seventy-five Dollars (\$75.00) per acre, and the number of installments and the percentage of the total payable in each annual installment shall be the same number and percentage as for the lands of the Boise Project outside of the District, but in that event, the amount of both stored water and flood water furnished for such project lands in the District by the United States shall be the same proportion of the amount furnished per acre to the lands of the Boise Project outside of the District as Seventy-five Dollars (\$75.00) per acre is to the charge announced for the Boise Project lands outside of the District; Provided, that in that event, the owners of project lands in the District, individually or the District on behalf of all the project land owners in the District, may, if they or it so elect, by supplemental contract with the United States, secure

from the United States works additional water sufficient to make their water rights equal in amount per acre to the rights furnished by the United States to similar project lands outside of the District, by payment of the difference between Seventy-five Dollars (\$75.00) per acre and the charge announced by the Secretary of the Interior in his Public Notice for the lands of the Boise Project outside the District, but the amount to be apportioned to the project lands in the District under this present contract shall not be in excess of Seventy-five (\$75.00) Dollars per acre. The installments of the charges apportioned to the project lands in the District shall be due and payable from the District to the United States on the same dates as fixed by the Secretary of the Interior in his Public Notice for the payment of the charges for the lands of the Boise Project outside of the District. The District will be reimbursed by the United States for the cost of distributing the water to said project lands in the District by the payment to the District of the pro-rata share of the cost of operation and maintenance provided in the contract of April 1, 1909, between the District and the United States, until the expiration of said contract as provided in paragraph 11 hereof and thereafter under the new contract provided to be made in paragraph 11 hereof. The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of

the Interior for similar lands of the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notices from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge.

13. It is fully understood that the old water right lands of the District shall not in any event be liable for any part of the charges herein agreed to be apportioned to and collected from the project lands, nor the project lands for any portion of the charges herein agreed to be apportioned to or collected from the old water right lands in the District, and the United States agrees to waive the right to hold either of said two classes of land for any part of the charges herein agreed to be apportioned to and paid by the other, but will look to the old water right lands for the old water right land charges and the project lands for the project land charges.

14. No interest will be charged on any of said installments for water to be supplied to said project lands in the District until due, but any part thereof which may remain unpaid after the same is due, shall bear interest from maturity until paid at ten (10%) per cent per annum, and the United

States shall not be obliged to deliver or turn out for the District any water for such project lands in the District as are in default on any of the payments herein provided to be made. Provided, the project lands in the District shall be subject to the same provisions as to residence, cultivation and limit of area as the lands of the Boise Project outside of the District.

15. The United States will assent to the release by the Payette-Boise Water Users' Association of such lands in the District as have been subscribed under stock subscription and contract to the said association, and have therefore become subject to the lien provided in such subscription and contract for the repayment of a proportionate part of the cost of the Payette-Boise Project from the lien and obligation of such stock subscription, and also release and cancel the contract under date of October 12, 1906, between the Nampa & Meridian Irrigation District, and the Payette-Boise Water Users' Association, providing for a credit to the subscribed lands of the District for existing works, as regards both the old water right lands and the project lands.

16. The Payette-Boise Water Users' Association agrees to join in the release of said stock subscription contracts and liens upon conditions above stated, and its name is subscribed hereto in evidence thereof.

17. Where any appropriations of water have been made and water rights acquired by parties other than the District out of any of the draws, sloughs or natural channels of the Nampa & Meridian Irrigation District, and such rights are interfered with by the deepening of such channels and the construction of the said drainage system in the District, it is understood that the money herein provided for the construction of drainage works shall be available for the satisfaction of any just claims for damages and of judgments, liabilities or obligations on account of, growing out of, or resulting from the interference with any such rights by the deepening of such channels and construction of such drainage system, and that the United States may pay such claims, judgments, liabilities and obligations out of said money. Any lateral construction which may be agreed upon between the District and the United States as being necessary to replace the rights of flow through natural drainage lines, may be built by the United States as a part of the drainage system herein contemplated.

IN WITNESS WHEREOF, the parties hereto have caused their names and seals to be attached the day and year first above written, the Nampa & Meridian Irrigation District, and the Payette-Boise Water Users' Association, acting in pursuance of resolutions of their Board of Directors, of

which certified copies are hereto attached and made a part hereof.

NAMPA & MERIDIAN IRRIGATION
DISTRICT,

(SEAL)

By H. B. Carpenter,
President.

ATTEST:

G. A. Remington,
Secretary.

PAYETTE-BOISE WATER USERS'
ASSOCIATION,

(SEAL)

By J. W. Brandt,

ATTEST:

W. L. Girard,
Secretary.

ANDRIEUS A. JONES,
*First Asst. Secretary of the Interior,
for and on behalf of the United
States.*

Sgd. Dec. 13, 1915.

EXHIBIT "B".

SUPPLEMENTAL CONTRACT

between the
NAMPA & MERIDIAN IRRIGATION DISTRICT
and the
UNITED STATES.

Draft of December 20, 1917.

THIS AGREEMENT, made this 5th day of November, 1918, between the UNITED STATES OF AMERICA, acting for this purpose through E. C. FINNEY, First Assistant Secretary of the Interior, under the provisions of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof and supplementary thereto, and particularly Sections 2 and 3 of the Act of Congress of February 21, 1911 (36 Stat. 925), hereinafter referred to as the United States, and the NAMPA & MERIDIAN IRRIGATION DISTRICT, an irrigation district organized under the laws of the State of Idaho, hereinafter referred to as the District.

WITNESSETH, That:

1. WHEREAS, under that certain contract between the United States and the Nampa & Meridian Irrigation District, dated June 1, 1915, it is provided that as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand (\$557,000) Dollars, and that the District will pay to the United States for that portion of the above described drainage work in the District equitably chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand (\$266,000) Dollars, and whereas, the drainage system contemplated under the provisions of said contract, and estimated to

cost approximately Five Hundred Fifty-seven Thousand Dollars, (\$557,000), has been constructed at a cost of approximately Three Hundred Forty Thousand Dollars (\$340,000), and whereas, it is not necessary to spend the balance of the said Five Hundred Fifty-seven Thousand Dollars (\$557,000), on the said drainage system, and whereas, neither the District nor the United States desires to spend any money unnecessarily on said work.

IT IS HEREBY AGREED that said drainage construction shall be terminated at a cost of not to exceed THREE HUNDRED FORTY THOUSAND DOLLARS (\$340,000), and the amount to be paid by the District to the United States for that portion of the said drainage works equitably chargeable to the old water right lands in the District shall be reduced in like proportion as the said cost of Three Hundred Forty Thousand Dollars (\$340,000) is less than the said estimated cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000), namely to $266/557$ ths of Three Hundred Forty Thousand Dollars (\$340,000), or One Hundred Sixty-two Thousand Three Hundred Sixty-nine and Eighty-four hundredths Dollars, (\$162,369.84).

2. AND WHEREAS, said estimate of the actual cost of Three Hundred Forty Thousand Dollars (\$340,000) contains an allowance for certain items of contingent liability and expense which may

or may not have to be paid, and whereas, there is also some possibility of additional credits from the sale or transfer of equipment.

IT IS HEREBY AGREED that should the actual cost as finally determined be less than Three Hundred Forty Thousand Dollars (\$340,000), the Secretary of the Interior will furnish the District a statement of such actual cost and in that event the amount to be paid by the District to the United States for that portion of the said drainage works equitably chargeable to the old water right lands in the District, shall be reduced to 266/557ths of such actual cost so stated by the Secretary of the Interior.

3. AND WHEREAS, the said contract of June 1, 1915, provides for furnishing water rights for the project lands of the District at a charge of Seventy-five Dollars (\$75.00) per acre, with a proviso that if the building charge announced by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project, is less than Seventy-five Dollars (\$75.00) per acre, then the assessment of benefits against the project lands in the District shall be reduced to the same amount per acre as is announced by the Secretary of the Interior for similar lands of the Boise Project, and whereas, the Secretary of the Interior, in his Public Notice of July 2, 1917, for the said Boise Project has announced a construction charge of Eighty

Dollars (\$80.00) per acre with a proviso that if within one year all the irrigable lands of the Boise Project are duly pledged to return the payment of the construction and operation and maintenance charges either through individual contracts, water users' association contracts, or through irrigation districts, duly organized and confirmed by judicial decree, then the said charge of Eighty Dollars (\$80.00) per acre will be reduced to Seventy Dollars (\$70.00) per acre, and further provides that if all of that portion of the project lying northeast of Indian Creek between the Nampa & Meridian Irrigation District and the New York Canal, is duly pledged to return the payment of the construction and operation and maintenance charges, then the said construction charge of Eighty Dollars (\$80.00) per irrigable acre for a full water right will be reduced to Seventy Dollars (\$70.00) per irrigable acre in said portion of the project, and whereas, the said portion of the Boise Project is the portion immediately adjoining the District, and whereas, the landowners of the District, through the organization of an irrigation district and the said contract between the District and the United States have already complied with all those provisions required of the said adjacent lands of the Boise Project as the conditions upon which the said Seventy Dollar (\$70.00) rate may be secured.

IT IS HEREBY AGREED and understood that the said rate of Seventy Dollars (\$70.00) per acre of irrigable land is the rate applicable to the said project lands of the Nampa & Meridian Irrigation District.

4. AND WHEREAS, the said contract between the District and the United States provides that the charges agreed to be paid by the District to the United States shall be payable in the same number of annual installments not less than ten (10) and same schedule of graduated payments as is fixed by the Secretary of the Interior in his Public Notice for similar lands of the Boise Project outside of the District, and whereas, under the provisions of the Act of Congress of August 13, 1914, known as the Reclamation Extension Act, and the Public Notice issued by the Secretary of the Interior under date of July 2, 1917, the charges for most of the lands of the Boise Project will be payable in twenty (20) annual installments upon the schedule of graduated payments set out in Section two of said Extension Act.

IT IS AGREED and understood by the parties hereto that the construction charges agreed to be paid by the District to the United States for drainage, storage rights and full water rights, shall be due and payable in twenty (20) annual installments upon the schedule of graduated payments set out in Section 2 of the said Extension Act, namely:

—The first four of such installments shall each be two per centum, the next two installments shall each be four per centum, and the next fourteen shall be each six per centum, of the total construction charge.

5. AND WHEREAS, in allotting water rights and apportioning benefits under the said contract of June 1, 1915, the District omitted to furnish any water rights to, or assess any benefits against, the dry lands within the corporate limits of the City of Nampa, and whereas there are about Two Thousand Five Hundred Ninety-five and Twenty-five hundredths (2,595.25) acres of dry lands within the said corporate limits, and whereas, the said lands are arid lands, incapable of producing agricultural crops without irrigation, but fertile and productive if irrigated and especially valuable for intensive farming purposes on account of their location, and whereas, there is no other available source of water supply for said lands except from the irrigation work constructed by the United States.

NOW, THEREFORE, it is hereby agreed that the District will purchase from the United States for said lands, and the United States will sell to the District for said lands, water rights from the irrigation works of the said Boise Project, and the District will pay the United States for said rights at the same rate per acre and will apportion bene-

fits to said lands at the same rate per acre as other project lands in the District and the water rights to be furnished for said lands to be of the same kind and furnished upon the same terms and conditions as those furnished to project lands of the District outside of the corporate limits, except that the District may deliver the water to the landowners at the corporate limits of the town of Nampa and shall not be required to distribute the water within the corporate limits, and that in the construction of the laterals for said lands the United States will not construct such laterals within the corporate limits of the City, except, where laterals of the same kind commonly built by the United States outside of the said corporate limits, can be built without any extra or unusual expense, the water to be distributed within the said corporate limits by the landowners themselves, or by such agency as they may select and provide for that purpose at their own expense, and all structures or special construction or maintenance required by the ordinances, regulations and police power of the City, shall be provided by the landowners of the City at their own expense.

6. AND WHEREAS, under the provisions of Section 6 of said contract of June 1, 1915, the District purchased from the United States storage rights in Arrowrock Reservoir to the extent of the proportionate part of the storage capacity of said

reservoir that Twenty-four Thousand Eight Hundred Forty Dollars (\$24,840.00) is of the total cost of said reservoir (\$4,750,000), and whereas, certain landowners of the District require some additional storage water and have applied to the District for approximately One Thousand Nine Hundred Ninety-two and three/tenths (1,992.3) acre-feet of additional storage capacity, and agreed to pay for the same;

IT IS HEREBY AGREED that in addition to the Twenty-four Thousand Eight Hundred Forty Dollars (\$24,840.00) provided in sections 6 and 7 of said contract of June 1, 1915, the District will pay to the United States the sum of THIRTY-NINE THOUSAND EIGHT HUNDRED FORTY-SIX and NO/100 DOLLARS (\$39,846.00) for storage capacity in Arrowrock Reservoir, and the United States will furnish the District in addition to the proportionate part heretofore contracted, the use and benefit of that portion of the total storage capacity of Arrowrock Reservoir which Thirty-nine Thousand Eight Hundred Forty-six Dollars (\$39,846.00) is of the total cost of said reservoir, and will deliver at the downstream end of the outlets of said reservoir for the District each year, as nearly as is reasonably practical, the same proportion of the stored water actually available from said reservoir, the said storage to be in addition to the amount heretofore contracted for and to be furnished in the same manner and upon the same

terms and conditions as the amount heretofore purchased under said contract of June 1, 1915.

7. AND WHEREAS, the Secretary of the Interior has approved rules and regulations for determining the irrigable acreage of the lands of the Boise Project outside of the District and under said rules and regulations has provided for certain reductions in irrigable acreage for rights of way of roads and canals;

IT IS HEREBY AGREED and understood by the parties hereto that the same reductions provided under said rules and regulations as to project lands outside of the District will be applied in determining the irrigable acreage of project lands in the District.

8. No Member of or Delegate to Congress, or Resident Commissioner, after his election or appointment, or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in section 116 of the Act of Congress approved March 4, 1909 (35 Stat. L., 1109).

UNITED STATES OF AMERICA,
By E. C. FINNEY,
*First Assistant SECRETARY OF
THE INTERIOR.*

NAMPA & MERIDIAN IRRIGATION
DIST.,

By DAN BARKER,

President.

(SEAL)

ATTEST:

G. A. REMINGTON,
Secretary.

EXHIBIT "C"
PUBLIC NOTICE (No. 6)

BOISE PROJECT, IDAHO-OREGON

Department of the Interior,

Washington, D. C., February 15, 1921.

1. ANNUAL OPERATION AND MAINTENANCE CHARGE FOR DRAINAGE.—In pursuance of Section 4 of the National Reclamation Act of June 17, 1902, (32 Stat. 388) and of Acts amendatory thereof, or supplementary thereto, particularly the Extension Act of August 13, 1914, (38 Stat. 686) announcement is hereby made that the annual operation and maintenance charge for the irrigation season 1921 and until further notice against all lands of the Boise Project under Public

Notice (except the One Thousand Eight Hundred (1,800) acres, more or less in the State of Oregon) shall be divided into two parts:

(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

(b) A special operation and maintenance charge for drainage purposes of One Dollar (\$1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c) cents per irrigable acre on April 1, 1921, and Fifty (50c) per irrigable acre on October 1, 1921, and Fifty (50c) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States, in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and water-logging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of

said minimum charge per acre and all charges per acre-foot of water used in excess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notices to be hereafter issued from time to time.

JOHN BARTON PAYNE,
Secretary of the Interior.

EXHIBIT "D"

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PAYETTE-BOISE WATER USERS' ASSO-
CIATION, Limited,

Plaintiff,

vs.

J. B. BOND, et al.,

Defendants.

IN EQUITY NO. 640.
DECREE.

This cause coming on to be heard upon stipulation for decree, by the parties to said cause, and the same having been approved by the United States of America, acting in that behalf by the Secretary of the Interior, and it appearing from said stipulation that the plaintiff and the United States of America have entered into a certain supplemental contract bearing date the 12th day of July, 1921, wherein and whereby all differences between the parties in the above entitled cause have

been adjusted and settled, which said stipulation and supplemental contract, together with the two exhibits attached to said contract as "A" and "B", "B" being a copy of Exhibit "X" filed in the suit, incorporated herein and made part hereof, are as follows:

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PAYETTE-BOISE WATER USERS' ASSO-
CIATION, Limited,

Plaintiff,

vs.

J. B. BOND, et al.,

Defendants.

STIPULATION FOR DECREE.

The Plaintiff and the United States of America having entered into that certain Supplemental Contract bearing date the 12th day of July, 1921, wherein and whereby all the differences between the parties in the above entitled matter have been adjusted and settled, and wherein it is provided that Decree may be entered in said cause, it is therefore stipulated that Decree may be entered in said cause in accordance with the terms of said supplemental contract, a duplicate copy of which is hereto attached and made a part hereof.

That findings of facts and conclusions of law are hereby waived.

J. B. ELDRIDGE,
Attorney for Plaintiff.
J. L. McCLEAR,
B. E. STOUTEMYER,
Attorneys for Defendants
J. B. Bond, C. C. Fisher and
Charles F. Weinkauff.

Approved this the 19th day of July, 1921.
United States of America.

E. C. FINNEY,
Acting Secretary of the Interior.

DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE,
BOISE IRRIGATION PROJECT.

*Contract Between the United States and Payette-
Boise Water Users' Association, Supplemental
to Contract of Feb. 13, 1906.*

THIS AGREEMENT, made this 12th day of July, 1921, between the UNITED STATES OF AMERICA, herein referred to as the United States, acting for this purpose through E. C. Finney, Acting Secretary of the Interior, herein referred to as the Secretary, under the provisions of the act of June 17, 1902 (32 Stat., 388), and acts amendatory thereof or supplemental thereto, herein referred to as the reclamation law, and the PAYETTE-BOISE WATER USERS' ASSOCIATION, LTD., herein referred to as the Association, witnesseth:

2. WHEREAS, under contract dated February 13, 1906, provision was made for the construction of the Boise Federal irrigation project, Idaho-Oregon, and for payment of the cost thereof; and

3. WHEREAS, in that certain case entitled, Payette-Boise Water Users' Association, Ltd., vs. J. B. Bond, et al., now pending undetermined in the District Court of the United States for the District of Idaho, Southern Division, there are involved, among other things, certain controversies with respect to the interpretation of said contract, to the payment of the cost of said project and to the quantity of water which the members of the Association shall receive for their lands; and

4. WHEREAS, it is desired by the parties hereto that said litigation be compromised and settled, and that all issues pending in said cause be adjusted, through the making of a contract supplementary to said contract of Feb. 13, 1906;

5. NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained the parties hereto do hereby agree as follows:

6. That in addition to the one-half portion of Arrowrock Reservoir heretofore dedicated (in that certain instrument certified copy of which has been introduced in evidence in said suit as Defendants' Exhibit "X") to the lands referred to therein as

the "project lands of the constructed unit" of the Boise Project, the said project lands of the constructed unit of said project shall have the use and benefit of an additional Fifty/two hundred sixty-eighths ($50/268$ ths) of the capacity of Arrow-rock Reservoir and no more, and the said additional Fifty/two hundred sixty-eighths ($50/268$ ths) shall be paid for by the owners of such project lands upon the same terms and conditions applicable to the portion heretofore dedicated.

7. That if Congress authorizes and appropriates funds for such expenditure and such expenditure is voted and agreed to as supplemental construction by a majority of the water right applicants and entrymen affected by the charge therefor as provided in Section 4 of the Act of Congress of August 13, 1914, known as the Reclamation Extension Act. then as soon after July 1, 1922, as is reasonably practicable, the United States will expend Two Hundred Thousand (\$200,000) Dollars on canal improvements on the canal system of the Boise Project, to consist mainly of additional concrete lining and other improvement and enlargement work on the Main Canal. It is estimated by the Project Manager that such expenditure will provide sufficient enlargement of the said Main Canal to safely carry through said canal during the flood water season of an average or normal year, about Forty-eight Thousand (48,000) acre-feet more

water than has been carried heretofore, and to such extent without lessening the delivery of flood water from the canals during May and June, avoid drawing down Deer Flat Reservoir during said months.

8. Should the Secretary of the Interior find it advisable to do so, he may increase the amount to be expended on such canal improvement work to an amount not exceeding Two Hundred Twenty-five Thousand (\$225,000) Dollars. Any additional amount so expended shall be added to the amount (Seven Million Three Hundred Thousand (\$7,300,000) Dollars) provided in paragraph 13 hereof, to be used in determining the proper charge per acre at the next readjustment date. It is understood that similar elements of cost will be charged to such canal improvement work and a similar method of distributing overhead or general expense will be used, as has been used in the above case of other features of the Boise Project. After the completion of said canal improvement work, the Secretary of the Interior will furnish a statement of the amount expended thereon, which in the absence of fraud or such gross error as would be equivalent to fraud, shall be considered as final and conclusive and binding on all parties as to the amount expended thereon.

9. From and after the date that the said canal improvement work shall have been voted and agreed

to by a majority of the water right applicants and entrymen affected by the charge therefor as provided in Section 4 of the said Act of Congress of August 13, 1914, until the completion of the expenditure of Two Hundred Thousand (\$200,000) Dollars on said canal improvement work, the project lands of the constructed unit of the project may have the temporary use of the Twenty-six Thousand (26,000) acre-feet of Arrowrock storage, or Twenty-six Two Hundred Sixty-eighths (26/268ths) of the capacity of Arrowrock Reservoir intended for permanent use on proposed extensions of the project, but under no condition shall such project lands of the constructed unit of the project acquire, or be construed to have any right to the use thereof, or any part thereof, after the construction of said Two Hundred Thousand (\$200,000) Dollars of canal improvement work, and the Association, its shareholders, successors and assigns, and all those claiming under the Association, expressly consent and agree that upon the completion of the expenditure of Two Hundred Thousand (\$200,000.00) Dollars on such canal improvement work, the right to the use of the said twenty-six thousand (26,000) acre-feet of storage on the project lands of the said constructed unit of the project shall terminate and the right to the use thereof shall revert in the United States as fully and completely in all respects as if no part of said Twenty-six Thousand (26,000) acre-feet had ever been used

upon the said project lands of the said constructed unit of the project, and it is agreed and understood that after the expenditure of said Two Hundred Thousand (\$200,000) Dollars in the construction of said canal improvement work, the said Twenty-six Thousand (26,000) acre-feet, or Twenty-six/Two Hundred sixty-eighths ($26/268$ ths) of the said reservoir may be used upon the proposed Hillcrest Extension of the Boise Project in the Hillcrest and Boise-Mora Irrigation Districts, or applied to such other use as may be decided upon and approved by the Secretary of the Interior and the Decree in said suit shall so provide. It is understood, however, that the use and benefit of the return flow from the Hillcrest and Boise-Mora Irrigation Districts into the New York Canal and Indian Creek will be allowed to the project lands of the said first or constructed unit of the project, as an additional water supply. If said canal improvement work, after having been authorized by the water users, is stopped through any act of plaintiff or of a member of plaintiff, the temporary use of said 26,000 acre-feet of water shall immediately cease and be restored only upon the interference of said work having been removed.

10. It is agreed and understood that all future drainage work in the constructed unit of the said Boise Project shall be provided for by operation and maintenance charges to be announced from

time to time by the Secretary of the Interior as operation and maintenance charges for drainage purposes and assessed against all project lands in the constructed unit, or first unit of the project. The operation and maintenance charges for drainage purposes coming due and payable in 1921 shall be One (\$1.00) Dollar per acre, of which Fifty (50c) per acre shall come due and payable April 1, 1921, and Fifty (50c) per acre on October 1, 1921, and the Association, on behalf of itself and its shareholders, stipulates and agrees to the payment of the charges so announced for drainage purposes as a proper operation and maintenance charge, and the Association guarantees the payment of the said drainage charges so announced against its shareholders by the Secretary of the Interior, and will use all the powers and resources of the Association to assist the officers of the United States in the collection of the same, or to itself collect and pay the same to the United States, the funds so paid in for drainage purposes to be expended under the direction of the Secretary of the Interior in the construction of drainage works on the constructed unit of the Boise Project beginning with those portions of the project where in the opinion of the engineer in charge of the said project, after counseling and advising with the Board of Directors of the Association, and drainage is considered to be most urgently needed. The project lands of the constructed unit of the project may

have the use and benefit of the water supply developed in the proposed drainage system, provided the Association or owners of such project lands furnish the means for diverting, or pumping, such water from the drains into the canal system and pay the cost of the operation and maintenance of such pumps or other means of diversion.

11. It is hereby stipulated and agreed that an amended form of water right application to be provided for and required under the Decree in said suit shall contain a provision expressly agreeing to the payment for future drainage work on the said Boise Project as an operation and maintenance charge; that in said water-right application appropriate provisions shall be made for the return and repayment to the United States of the construction charges herein provided to be repaid, with reference and description of the interest acquired by the applicant when payments shall have finally been made as herein provided; that such water-right application shall be fully recorded; and the Court may limit the time in which water right application shall be received, and provide appropriate penalties for failure to execute and deliver such water-right applications, within the time provided in said decree. Such water-right application shall be in form as Exhibit "A" hereto attached and made a part hereof. It is understood that in executing this contract the Association waives no right to collect any and all unpaid assessments heretofore made

by it against its members or their stock in said Association.

12. It is understood, however, that the said operation and maintenance charge for drainage shall not apply to the Eighteen Hundred (1800) acres of project lands in Oregon which have been annexed to the Big Bend Irrigation District and have provided for drainage and are assessed therefor in addition to the regular charge for project water right.

13. It is hereby stipulated and agreed that the amount properly chargeable to the project lands of the constructed unit of the project outside of the Irrigation Districts and subject to the Association as the construction charge, is the sum of SEVEN MILLION THREE HUNDRED THOUSAND (\$7,300,000) DOLLARS, including the additional fifty/two hundred sixty-eighths ($50/268$) of the Arrowrock Reservoir, and the Two Hundred Thousand (\$200,000) Dollars of canal improvement work to be provided as supplemental construction, but not including future drainage work (which drainage work will be charged as operation and maintenance.)

14. That the construction charge per acre shall be readjusted every five (5) years for four (4) times and no more, and shall be determined by dividing the said sum of Seven Million Three Hundred Thousand (\$7,300,000) Dollars by the number of

acres of irrigable lands referred to as project or full Government water right lands in said first or constructed unit of the project outside of the Nampa & Meridian, Black Canyon and Settlers' Irrigation Districts then found to be subscribed to accepted water right applications and paying construction charges, and by debiting or crediting each tract with such amount as is necessary to adjust the construction charge to the new rate per acre so determined, allowing credit, or making additional charge to make up for any over-payment or under-payment in previous years, such credit (if there be a credit) to be allowed on the next construction payment coming due after such readjustment of the rate per acre, and such debit or additional charge (if a debit or additional charge be required in making such adjustment) to be added to and become due and payable at the date of the next construction payment after the date of such readjustment of the charge per acre, and it is agreed and understood that it shall be provided in the Decree and in the amended form of water right application to be provided for in the Decree, that the rate of construction charge per acre so determined as aforesaid (whether more or less than the rate announced in the Public Notice and set out in water right applications previously signed) is the rate which shall control and the rate which shall be paid by all of the Association's shareholders.

15. Acreage on which the charges are suspended on account of seepage shall be deducted in arriving at the number of acres to be used as the divisor in determining the proper charge per acre, but whenever any part of such suspended areas shall be brought back to a productive condition and be again irrigated and be placed on a paying basis, then the acreage so recovered shall at the next readjustment date be added to and be considered a part of the number of acres to be used as the divisor in determining the proper charge per acre. In determining what part of any tract or farm unit is irrigable, the amount shown as irrigable on the official form unit plats shall be used.

16. Whenever any shareholder of the Association shall be in arrears more than one (1) year for the payment of any charge for operation and maintenance and penalties, or any part thereof, the Association will, upon notice from the Secretary of the Interior, or the agent or employee of the Secretary of the Interior in charge of the Boise Project, use all the powers and resources of the Association to enforce payment by such stockholder to the United States and to carry out the Association's guarantee under the contract of February 13, 1906, between the Association and the United States, but if on account of the abandonment of any tract of land, or for any other reason, any construction or operation and maintenance payments thereon re-

mains due and unpaid for more than three (3) years, the same shall then be considered as not being on a paying basis and shall be deducted from the number of acres used as the divisor in determining the proper charge per acre at the next readjustment date, but may be again added to the acreage used as divisor if payments are resumed.

17. The charge per acre shall be first readjusted as provided above on January 1, 1926, or as soon as practicable after such date and according to the conditions existing on said date and shall be again readjusted each fifth (5th) year thereafter, limited, however, to 4 readjustments and no more.

18. If on account of failure of the necessary majority of the water users affected thereby to vote or agree to pay the said Two Hundred Thousand (\$200,000) Dollars of canal improvement work as supplemental construction, or for any other reason the said canal improvement work should not be built, proper credit will be allowed at the next readjustment date.

19. It is agreed that the acreage of project lands in the constructed unit of the project outside of the Nampa & Meridian and Settlers' Districts which is now subscribed to water right applications is Ninety-five Thousand One Hundred Nine (95,109) acres, and that the payments of Eight Hundred Fifty-two (852) acres are now suspended

on account of seepage, and that the construction charge per acre until the first readjustment on January 1, 1926, shall be determined by dividing said Seven Million Three Hundred Thousand (\$7,300,000) Dollars by Ninety-four Thousand Two Hundred Fifty-seven (94,257) acres, subject to readjustment every five (5) years as above provided. Credit for any over-payments heretofore made will be allowed on the construction instalment coming due December 1, 1921.

20. In the operation of the said Boise Project after the construction of said Two Hundred Thousand (\$200,000) Dollars of canal improvements, the United States and its successors in control of the project will try to equalize the benefits and the water supply between the lands supplied from Deer Flat and the lands supplied from Arrowrock as far as practical and to that end will furnish as an additional water supply for the said project land above Deer Flat the Arrowrock storage secured by delivering certain waste and seepage waters into the Riverside and Phyllis Canals in exchange for Arrowrock storage to which the lands under said canals would otherwise be entitled, estimated to amount to about Two Thousand Two Hundred (2,200) acre-feet, and so far as practical will avoid running any Arrowrock storage water through Deer Flat after the use of stored water for irrigation has begun.

21. If a majority of the water users by vote or agreement approve the gradual enlargement of the Mora and Waldvogel Canals from year to year in connection with the annual cleaning work and the charging of such work to operation and maintenance, such gradual enlargement will be so carried on and charged unless it is held by the courts that that cannot be lawfully done.

22. It is understood that the said sum of Seven Million Three Hundred Thousand (\$7,300,000) Dollars includes ten/fourteenths ($10/14$ ths) of the amount charged in said Defendants' Exhibit "X" on account of what is known as the Page and Brinton claim now pending in the Court of Claims, said Court of Claims having allowed the amount of Fifty Thousand Two Hundred Twenty-eight and Ninety-three Hundredths Dollars of the sum of Three Hundred Twenty-five Thousand Nine Hundred Thirty-one and Ninety-seven Hundredths Dollars, being the amount of said Page and Brinton claim, and it being understood and agreed that an appeal may be taken by Page and Brinton or the United States in said cause, and that what may finally be paid cannot at this time be ascertained, and it is agreed that should such claim not be paid, or a less amount be paid thereon than charged in said Exhibit "X", then at the next readjustment date after the final termination or settlement of said case, the proper reduction shall be made in said sum of Seven Million Three Hundred Thousand

(\$7,300,000) Dollars to the extent of Ten/fourteenths (10/14ths) of the difference between the amount charged in said Exhibit "X" on account of such claim, and the amount actually paid thereon, and proper allowance be made in readjusting the construction charges. It is understood that the said Page and Brinton claim is being resisted by the United States in said Court of Claims as an unwarranted and unjust claim and it is understood and agreed between the parties hereto that it is not intended by this instrument to recognize said claim, or any part thereof, as being a valid claim, and the Court may so provide in its Decree entered hereunder; and it is agreed that in similar manner any other claim, or judgment, which may hereafter be actually paid and not charged to operation and maintenance, may be added to the said Seven Million Three Hundred Thousand (\$7,300,000) Dollars in determining the proper charge at the next readjustment date.

23. It is agreed that the Court may enter Final decree in harmony with this contract.

24. No member of or Delegate to Congress, or Resident Commissioner, after his election or appointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be con-

strued to extend to any incorporated company, where such contract or agreement is made for the general benefit of such incorporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1905 (35 Stat. L., 1109).

25. A copy of the dedication referred to herein as Defendants' Exhibit "X" is hereto attached, marked Exhibit "B", and made a part hereof.

UNITED STATES OF AMERICA,
By E. C. Finney, Acting Secretary.
BOISE-PAYETTE WATER USERS'
ASSOCIATION, LTD.
By C. M. Rankin, President.

ATTEST:

L. J. Magee, Secretary.
(Corporate Seal)

EXHIBIT "A"
DEPARTMENT OF THE INTERIOR
UNITED STATES RECLAMATION SERVICE
BOISE IRRIGATION PROJECT

WATER-RIGHT APPLICATION

.....
(Serial Number)

.....
(Date)

1. I,, in
pursuance of the provisions of the Reclamation Act

approved June 17, 1902, (32 Stat., 388), and acts amendatory thereof or supplementary thereto, especially the act approved August 9, 1912 (37 Stat., 265), and the act approved August 13, 1914 (38 Stat., 686), all hereinafter called the Reclamation Law, and the rules and regulations established thereunder, do hereby apply on behalf of myself, my heirs, executors, administrators, and assigns, for a water right for the irrigation of, and to be appurtenant to,acres of irrigable land, as shown on plats approved by the Secretary of the Interior within the tract described as follows:

.....

 Section
 Township....., Range.....
 Meridian, containing a total of
acres.

2. The measure of water right for said land shall be the pro rata share as nearly as practical operations will permit, of the waters agreed to be furnished in that certain supplemental contract between the United States of America and the Payette-Boise Water Users' Association, Ltd., bearing date the 12th day of July, 1921, and the decree of court hereinafter referred to, and the dedication attached to said contract, which the number of irrigable acres described in this application is of the number of irrigable acres of project lands in the said first or constructed unit of the Boise Project.

3. I agree (a) to pay the annual instalments of the construction charge as provided in said above mentioned Supplemental contract, and the Decree of the Court in the case of Payette-Boise Water Users' Association, Ltd. vs. J. B. Bond, et al., in the United States District Court for the District of Idaho, Southern Division, at the rate of \$77.44 per acre of irrigable land subject to adjustments as provided in said Supplemental contract, and said Decree of Court as aforesaid, and to proper credits for all construction charges heretofore paid, on account of said land, and in addition thereto the annual charges for operation and maintenance as prescribed by the Reclamation Extension Act, and all penalties which may accrue for failure to make payments at the proper time; (b) that the construction charge and each and all of said annual charges for operation and maintenance with accrued penalties shall be and the same are hereby made a lien upon the tract of land above described and all water rights now or hereafter appurtenant or belonging thereto and all improvements now existing or hereafter made thereon, promising, covenanting, and agreeing to pay all taxes and other claims now or hereafter becoming a prior encumbrance, failing which, upon demand by any proper officer of the United States, or its successors in control of said project, the United States, or its said successors may pay the same and add the amount thereof to

the lien hereby created and recover the amount so paid as part of the said lien.

4. Upon my failure to comply with the terms of the Reclamation Law, and the regulations thereunder, this application may, in the discretion of the Secretary of the Interior, be cancelled by him with the forfeiture to all rights under the Reclamation Law and of all moneys theretofore paid hereon; excepting, however, from the force and effect of this paragraph any and every failure to make payments which shall become due and payable after the issuance of final certificate for the water right hereby sought under the Reclamation Law, a remedy for the failure thus excepted having been provided by said Law.

5. This application must bear the certificate, as hereto attached, of the water users' association, under said project, which has entered into contract with the Secretary of the Interior, and the liens which the United States holds against the above-described land for the payment of the construction, and the operation and maintenance charges, may be enforced, at the option of the United States, either directly by the United States, or where any such lien was given directly to the water users' association for the benefit of the United States, may be enforced through the medium of the water users' association; but the election of one remedy shall

not preclude the United States from following the other.

6. I further agree that the United States and its successors in charge of the said unit shall have full control over all ditches, gates, and other structures owned or controlled by the applicant or his successors in interest and which required to deliver water hereunder, and proper officers and employees of the United States and its successors shall have at all times the right of access to the above-entitled premises whenever it is, in the judgment of the officer or employee in charge of said unit, necessary for them in the discharge of their duties of distributing water to exercise said control. The apportionment and distribution of the water in accordance herewith shall be performed by the Project Manager and his successor. And I do hereby give, grant, bargain, sell, and convey to the United States and its said successors the right for any such proper officer or employee to go and come upon any and all lands now or hereafter owned or held by me or them for any necessary or proper purpose and there exercise said control. In distributing and apportioning the water the Project Manager may take into consideration the character and necessities of the land. The remedy of any party feeling aggrieved by any alleged shortage or mistake in the delivery of water shall be by application first to the Project Manager, and then if necessary to the Court for an order for the correction of such

error or mistake, but neither the United States nor its officers or agents shall be liable in damages on account of any alleged shortage or mistakes in the delivery or division of the waters of the project.

7. It is understood and agreed that the United States reserves the right upon my failure or the failure of my successors in interest to keep and perform any of the provisions in this instrument contained by me and my successors in interest undertaken to be kept and performed, to refuse to deliver water to said lands or to stop the delivery of water thereto if water is being delivered, and such refusal to deliver or stoppage of delivery of water shall not operate to cancel this application, but shall be considered as an additional remedy to the United States to any remedies existing by reason of the provisions of this application or otherwise.

8. And I do hereby grant, bargain, sell, convey, and confirm to the United States of America and its successors in charge of the project all rights of way for ditches, canals, flumes, pipe lines, telegraph and telephone transmission lines, or other structures now constructed, or hereafter found necessary for construction, by or under the authority of the United States for or in connection with the said project, and all rights of way that may be or become necessary and suitable and that may be required for the prosecution and operation of the said project, and for the construction, mainte-

nance, and operation of ditches, canals, flumes, pipe lines, telegraph and telephone, and transmission lines, constructed by or under authority of the United States and its successor in charge of the project for and in connection with said project, to have and hold the same, together with all the tenements, hereditaments, privileges, and appurtenances thereunto belonging or in anywise appertaining to the United States of America and its assigns and successors in charge of the project forever, subject notwithstanding to the conditions upon which this application is made. It is understood and agreed that the United States reserves the right to recover and use for the benefit of the project all waste and seepage water arising on or flowing from said land and does not abandon but intends to use the same but as to water developed in the proposed drainage system it is understood that this reservation is subject to the provisions of paragraph 10 of contract of July 12, 1921, between the United States and the Payette-Boise Water Users' Association.

9. In consideration of the benefits received and to be received, and of the covenants herein contained, I promise and agree, to pay as an operation and maintenance charge, assessments for drainage upon the Boise Project, as levied from time to time by the Secretary.

10. No Member of or Delegate to Congress, or Resident Commissioner, after his election or ap-

pointment or either before or after he has qualified and during his continuance in office, shall be admitted to any share or part of this contract or agreement, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract or agreement is made for the general benefit of such corporation or company, as provided in Section 116 of the Act of Congress approved March 4, 1909, (35 Stat. 1109).

11. And I, the said....., being duly sworn, depose and say that my post-office address is.....; that I am, or that I or my predecessor in interest was at the time of filing original water right application, a bona fide resident upon said land (or occupant thereof, residing in the neighborhood, namely, upon Section....., Township....., Range....., Meridian, a distance in a direct line of.....miles therefrom); that I hold the following interest in the said tract:

..... as, duly shown upon the records of..... County, in volume (liber).....at page (folio).....; that no other application, now uncanceled, has been made for a water right under the Reclamation Law, appurtenant to land now owned or reclaimed by me, except as follows:

Application No., Project, of for

Section, Township,
 Range, Meridian, an
 area ofacres and containing.....
 acres of irrigable land, as determined by the Sec-
 retary of the Interior, for which the present appli-
 cation is substituted; and that the present appli-
 cation is made in my own behalf and not at the
 instance or for the benefit of any other person or
 any association or corporation either directly or
 indirectly.

12. Nothing in this application contained shall
 be construed as in any manner or at all abridging,
 limiting, or depriving the United States of any
 means of enforcing any remedy in law or equity
 for the breach of any of the provisions of this ap-
 plication which it would otherwise have.

13. This contract shall extend to and be bind-
 ing upon the heirs, succesors, and assigns of the
 parties hereto.

IN WITNESS WHEREOF, I,.....
 have hereunto set my hand and seal this.....
 day of....., 1921.

..... (Seal)
 (Seal)

In the presence of:
 (Three witnesses must sign here.)

ACKNOWLEDGEMENT.

State of Idaho)
) ss.
 County of.....)

On this the day of, 1921,
 before me,, a notary
 public in and for said State of Idaho, personally
 appeared
 and
 known to me to be the person..... who executed the
 within instrument and acknowledged to me that
execute..... the same:

In witness whereof I have set my hand and af-
 fixed my official seal the day and year in this cer-
 tificate first above written.

My commission expires.....

.....
Notary Public for Idaho.

Residing at....., Idaho.

STATE OF.....)
) ss.
 COUNTY OF.....)

....., being duly
 sworn, deposes and says that he is the person (or
 one of the persons) who signed the foregoing in-
 strument; that he has read the same and knows the
 contents thereof and that all the statements of fact
 made by him in said instrument are true of his
 knowledge, except such as are made upon informa-

tion and belief and as to those he believes them to be true.

.....
Subscribed and sworn to before me this.....
day of, 1921.

.....
Notary Public for Idaho.

Residing at....., Idaho.

My commission expires.....

....., 1921.

I hereby certify that the applicant signing the above instrument has duly subscribed (or is the successor in interest of one who has subscribed) for the stock of this association for the lands described therein.

.....
*Secretary.....Water Users'
Association.*

Approved and accepted this..... day
of, 1921, by authority of the
Secretary of the Interior.

.....
Project Manager.

The Payette-Boise Water Users' Association, Ltd. agrees to the within and foregoing covenants, it being understood, however, that in so doing said Association waives no right to collect any and all unpaid assessmensts heretofore made by it against

its members or their stock in said Association.

PAYETTE-BOISE WATER USERS'
ASSOCIATION, Ltd.

ByPresident.

ATTEST:Secretary.

Now, therefore, in accordance with said stipulation and supplemental contract, it is ordered, adjudged, and decreed that the construction, drainage and other charges of said project be paid to the United States of America, in the amounts and in the manner and upon the terms and conditions as provided by law and as set forth in said stipulation and supplemental contract; that all of the members of plaintiff upon said Boise Project within said first constructed unit or division shall, on or before sixty days from the date of this decree, execute and deliver to the plaintiff association, who shall in turn approve, execute and deliver to the Project Manager of the Boise Project, a water right application in form as that attached to said stipulation and supplemental contract, forming a part of this decree as aforesaid; and that all the members of plaintiff shall be entitled to the water right, or right to the use of the waters of said system, as defined in said stipulation and supplemental contract and the dedication attached thereto as Exhibit "B", upon the terms and conditions therein set out, and that all of the covenants and agreements of said stipulation and supplemental contract are hereby adopted and confirmed as a part of this

decree as fully and completely as if specifically set out in the body of this decree. Provided that where there is a provision of law prescribing the conditions under which water may be denied a user because of his default, neither the form of water right application incorporated herein nor the requirement hereof that such form be executed shall be construed as adding to or curtailing the rights of any party in interest as the same are defined by such provision of law. Nor in case of a controversy in good faith shall such application or this decree be construed as curtailing or opposed to the right of a water user to apply to a court of competent jurisdiction for temporary relief, or the power of such court upon a proper showing to direct that water continue to be supplied to the user until the controversy with him can be adjudicated or otherwise settled.

It is further ordered and decreed that after the expiration of sixty days from the date hereof the Project Manager may, in his discretion, decline to furnish water to any member of the plaintiff association for lands upon said first constructed unit or division outside of the organized irrigation districts, so long as such member neglects or refuses to execute said water right application as aforesaid.

The injunctive orders heretofore made heretofore are modified to conform to stipulation and contract

attached hereto and so modified will be continued in force until further order of the court or until the applications provided for herein have been filed. And the court retains jurisdiction of this cause for the purpose of making such further orders or disposition thereof as may be deemed proper.

No costs are awarded to either party.

Dated this 28th day of July, 1921.

FRANK S. DIETRICH,
District Judge.

Endorsed, Filed July 28th, 1921.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

EXHIBIT "E".

*In the District Court of the United States for the
District of Idaho, Southern Division.*

PAYETTE-BOISE WATER USERS' ASSO-
CIATION, LIMITED,

Plaintiff,

vs.

J. B. BOND, et al.,

Defendants.

No. 640.

SUPPLEMENTAL OR AMENDATORY
DECREE.

This cause came on to be further heard this 30th day of August, 1921, all attorneys of record for the respective parties being present, and it appearing that by inadvertance the decree here-

tofore, to-wit, on the 28th day of July, 1921, entered upon the stipulation and agreement of the plaintiff and the duly authorized representatives of the Government, contains no provision disposing of the case as to other parties, and all parties through their respective counsel, now consenting that a supplemental or amendatory decree may be entered upon the record and the evidence heretofore adduced; therefore, to supplement said decree of July 28th, 1921, it is upon consideration, ordered, adjudged, and decreed as follows:

1. Upon motion of their attorney, the intervenors' complaint in intervention is hereby dismissed without prejudice.

2. The plaintiff is without right in and has no lien upon any lands within the Pioneer Irrigation District, or within the Nampa & Meridian Irrigation District, and is without right in or lien upon any lands lying under and receiving water from the canal of the Riverside Irrigation District, a private corporation, by virtue of the stock subscription contracts referred to in the complaint.

3. Pursuant to the terms of its contract with the Government, the Pioneer Irrigation District is the owner of the right to receive an undivided 56/750ths part of the storage water of Arrowrock reservoir, to be delivered as provided in said contract, and that the plaintiff is without right in or title to such proportionate interest.

4. Pursuant to the terms of its contract with the Government, the Nampa & Meridian Irrigation District is the owner of the right to receive such part of the waters stored in Arrowrock reservoir as corresponds to the ratio between \$64,686.00, the amount paid to the Government therefore, and \$4,601,183.82, the cost of the reservoir, to be delivered as provided in said contract, and that the plaintiff is without right in or title to such proportionate interest.

Both of said rights are apart from and do not infringe upon the rights of the plaintiff in Arrowrock reservoir and the water stored therein, as defined and provided for in the original decree and the agreement embraced therein, and it is not to be understood that said decree is in any wise modified or affected by any provision herein contained.

Dated this 2nd day of September, 1921.

FRANK S. DIETRICH,

District Judge.

Endorsed, Filed Sept. 1, 1921,

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MOTION TO DISMISS.

Comes now the Defendant, J. B. Bond, and moves the Court to dismiss the complainant's complaint herein on the ground that the facts stated in the said complaint are insufficient to constitute

a valid cause of action in equity and that the said complaint states no ground for equitable relief.

E. G. DAVIS,
B. E. STOUTEMYER,
Attorneys for Defendant.
Residence: Boise, Idaho.

Service by delivery of copy acknowledged this 22nd day of April, 1922.

HUGH E. McELROY,
Attorney for Complainant.

Endorsed: Filed April 22, 1922,

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

No. 983.

DECISION ON MOTION TO DISMISS COMPLAINT.

In accordance with the expressed desire of the parties, the averments of the complaint are given a liberal construction to the end that the merits of the controversy may be adjudged upon the motion to dismiss without the necessity of a trial more fully to disclose the particular facts.

1. Our discussion may be clarified by having at the outside a just understanding of the plaintiff's relation to the subject matter of the suit. Whatever may be its formal, legal status under its contract with the Government, it is not the real party in interest. In practical effect it is but an

intermediary, an agency, resorted to by the real parties in interest, for convenience, in the distribution of water and the collection of charges on account thereof. Back of it, as the real plaintiffs are the project lands within its borders; they are the sole beneficiaries.

2. Originally these lands had precisely the same status as all other lands on the Project.

3. This status was not materially altered by the contract between the District and the Government. The contract concerns procedure, and relates to form rather than substance. It clearly discloses the intent of the parties thereto that in effect all Project lands, both within and without the District, were to continue to be upon the same footing, sharing ratably in the benefits and burdens of the irrigation system.

4. While the facts are not expressly pleaded, it does appear in the record of the case the decree in which plaintiff pleads and exhibits as a part of the complaint, and in the public reports of the Reclamation Service, that the cost of the drainage facilities constructed in the plaintiff district under the terms of the contract exhibited in the complaint (other than the part thereof allocated to old water right lands) was charged not to the plaintiff lands alone, although they were the only lands protected thereby, but ratably to all the lands in the Project. It is a further known fact that of the other Project

lands some are on the system above the plaintiff lands and other are below; and most of these lands could receive no benefit at all from such drainage facilities and the others could be only slightly or indirectly benefited.

5. In fairness and equity, then, what can be said in defense of the position for which the plaintiff lands now contend? During the earlier part of the operation of the system, when they were threatened with destruction or injury from the rising ground water, they sought and were given protection by the construction of a drainage system, the cost of which was included in the general construction charge, and as such was, of course, ratably apportioned to all the lands in the Project. Now when as a result of the further operation of the system, for their use and benefit, as well as for the balance of the Project, other lands are menaced in the same way and from the same source, they seek to shift the entire burden of similar protective measures to the lands to be directly benefited. When they were threatened they did not, as now, invoke the doctrine of assessment of benefits; at least no such doctrine was recognized or applied in distributing the cost of the drainage facilities created for their protection.

6. Though there is no equity in the position, we are asked to sustain it because of certain consideration of technical law. In substance, as I

understand it, the reasoning is that the plaintiff lands are in an irrigation district, that the charges must be collected by assessments under the state law, and that before such assessments can be made there must be an apportionment of benefits; and that the plaintiff lands are in no need of further drainage facilities and hence no benefits can be apportioned. But in so reasoning sight is lost of a fundamental characteristic of all irrigation systems constructed under either the state or the federal laws. Such a project is an indivisible unit, the burden of constructing and maintaining which is apportioned ratably to all lands receiving water therefrom. A water user cannot divide a system into its component parts and decline to pay his share of the cost of constructing or maintaining, or of operating, those portions from which he receives no direct benefit. If a wasteway at the lower end of a system, or a drainage ditch, is essential to the lawful and efficient maintenance and operation of the system, it is properly to be regarded as a part of the system and a water user near the head can no more consistently decline to pay his ratable share for its construction and maintenance than he could decline to pay for the lower portion of the main canal, or for laterals that do not serve his lands. When the drainage ditches within the plaintiff district were constructed for the plaintiff lands they were correctly treated as a part of the irrigation system, and quite as correctly their cost

was distributed ratably to all the lands without consideration of the question of direct benefit. It follows that by the apportionment already made in the district of the benefits of the system as a whole, pursuant to the state statutes, the basis of distributing cost has been fixed once for all; not the cost of constructing or maintaining any single unit but the entire system, including every feature thereof whether primary or auxiliary. It is the apportionment of the burden of constructing the entire project in accordance with the benefits received by the several tracts of land from the Project as a whole.

7. There is the further contention that this is not a proper charge for "operation" and "maintenance". These terms are found both in the reclamation act, as amended, and the contract between the plaintiff district and the United States. They are of elastic and often indefinite import. In systems of accounting, especially of public service corporations, what should be entered as capital or construction, and what as operation or maintenance, is not infrequently a question of great difficulty, and is sometimes susceptible of only an arbitrary answer. If in strictness we undertake to apply the narrow views advanced by the plaintiff that the maintenance of an irrigation system is accomplished by "merely maintaining the status quo" of the physical plant, we are soon driven to absurdities. If a wooden head-gate rots out we could not replace it with one of concrete, though

satisfied that in the long run it would be economy so to do. If there turns out to be excessive seepage in a section of the canal it cannot be prevented by puddling or otherwise treating the canal to prevent waste, for that would be to change to status quo. If there is a break in the earth bank of the main canal on a side hill, however great the danger of a repetition of the break, and however prudent it would be to re-enforce the earth with a concrete lining, thus insuring against future disaster, such a course would be to alter the status quo, and therefore could not be followed without putting into motion the complicated machinery required for raising money for new construction work. But illustrations without number, of the inadequacy and impracticability of such a view, will readily occur to anyone who has observed the operation of a large irrigation system, either at close range or from a distance. The government has fixed the construction charge upon this system, under the law, and it cannot now add to it without the consent of a majority of all of the water users. If, in the management of this great system, with its hundreds of miles of canals, its dams, and gates and a multitude of devices for diverting, impounding, carrying and distributing water, it cannot in an intelligent way provide for new conditions, or in the light of experience make new and better provision for old conditions, by charging the reasonable expenses thereof to maintenance and operation, the value and ef-

iciency of the system would be greatly impaired. Surely such a result could not have been intended by Congress, or by the parties to the contract here involved. The terms maintenance and operation must have been used in a broader sense—a meaning perhaps not susceptible to precise and comprehensive definition but none the less well understood.

True, the expenditures under consideration is relatively large, but it is to be borne in mind that it is to meet a condition which has gradually grown up as a result of the continued operation of the system. If each year there had been a collection and expenditure of an amount commensurate with the result of that year's operation, the case would present a different aspect, but would involve the same principle. By express admission the condition to be overcome is the direct result of operation, and is an incident thereof, and if the Project is to be "maintained" the expenditure must be made. If in the course of operation the management incurred a liability for injury to land by flooding or for destruction of crops, undoubtedly the expense of discharging such a liability would be borne as an operating expense. May it not take the less expensive course of providing safe-guards against such flooding and charge the expense thereof to maintenance and operation? With knowledge that the operation of the system without drainage facilities will inevitably swamp large areas of land, rendering the same worthless and destroying the

crops and trees growing thereon, must the plaintiff stand by until confronted with claims for damage?

Plaintiff frankly concedes that the condition against which the Government seeks to provide is a direct result of operating its irrigating system. It also concedes that while ground water is always a possible, if not a probable contingency, drainage facilities to take care of it cannot safely be provided in advance, for there can be no intelligent prognosis of just where such waters will rise and do or threaten injury. If, however, the cost of such facilities are chargeable only to construction, the Government is in this dilemma: Until it has completed its irrigation system and sold water rights and has delivered water to supply them, it cannot include such cost in the cost of construction, for there are no possible data upon which to base an intelligent estimate of the amount. But it must fix the "construction charge" before it can sell water rights. Hence such charge cannot be included in the construction cost as declared in the Public Notice; and the amount fixed in the Public Notice cannot thereafter be increased without the consent of a majority of the water users. Whether such consent would ever be given, even in case of the most urgent need, if such need is not general but only local as is likely always to be true, is a question that may be referred for answer to the attitude of the plaintiff lands in the instant suit.

It is not thought that Congress could have intended that the terms, operation and maintenance, should be construed so strictly as thus to render the Reclamation Service impotent to protect the Government investment and the interests of the settlers. A reclamation project is for the reclamation and not the destruction of lands, and it is expected that the reclaimed lands will return the investment and maintain the Project as a going and fruitful concern. Here is an operation result highly injurious to the Project. If the proposed protective measures are not taken, admittedly a large area of Project lands will be rendered worthless. If they are thus made worthless they will not only be incapable of returning to the Government their ratable and apportioned part of the construction cost, but they will also necessarily fail to carry any part of current maintenance and operation, and thus will be shifted their proper burden to the remaining lands on the Project, including the plaintiff lands. But this is not all. If in principle the plaintiff's contention is right, it is equally applicable to a case where the ground water rises uniformly over the entire Project, and threatens the destruction of all the lands at the same time. In such a case the Project as a whole cannot be "maintained" but is to be destroyed, as a result of "operation", because an admittedly sensible expenditure, by which such self-destruction can be avoided, may not be charged as an expense of either operation or

maintenance. In other words, the cost of self-preservation from an ordinary and necessary incident of operation is not chargeable to either maintenance or operation. To state the proposition is to reject it.

8. Finally it is suggested that until recently it has been customary with the Reclamation Service to carry drainage as a part of construction. I do not stop to inquire touching the correctness of the statement. The facts are not expressly pleaded, and if, so far as concerns this project, we go to the sources from which the facts are to be gotten, we find that at the time the drainage expenditures covered by the plaintiff's contract were made, the service also included in "Construction" cost, what are admittedly expenses of operation and maintenance. That is to say, during the long period prior to the giving of formal public notice the partially completed system was operated, and in the course of such operation large expenses were incurred over and above the rentals and other income for the same period, and this balance was covered into and charged against construction cost; it follows that a like disposition of the drainage expenditure has little interpretive significance.

It being thought that the proposed method of providing protective means, admitted to be necessary, against a menace, conceded to be the direct result of operating the system, is fair and equitable, and

contravenes no statutory or contractual rights, the motion to dismiss will be allowed.

HUGH E. McELROY,

Attorney for Plaintiff.

E. G. DAVIS and

B. E. STOUTEMYER,

Attorneys for Defendants.

ELDREDGE & MORGAN,

Attorneys for Intervenor.

Dated August 22, 1922.

Dietrich, District Judge.

Endorsed: Filed Aug. 22, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

DECREE.

It appearing that the foregoing cause was duly argued to the Court upon the motion of the Defendant, J. B. Bond, praying for an order for the dismissal of the bill of complaint, the Defendant present by B. E. Stoutemyer, Esq., his attorney and the Complainant present by H. E. McElroy, Esq., its attorney and the said Intervenor not present either in person or by attorney, and that the Court after due consideration allowed said motion and entered its order for the dismissal of said action on August 22, 1922;

Now therefore, it is hereby considered, ordered and adjudged that said action be and the same is

hereby dismissed and that the said Defendant recover his costs hereby taxed at.....

Dated this 25th day of October, 1922.

FRANK S. DIETRICH,
Judge.

O. K. B. E. Stoutemyer.

Endorsed, Filed Oct. 25, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PETITION FOR APPEAL.

The above-named Complainant, feeling aggrieved by the decree and order of dismissal rendered and entered in the above-entitled caus on the 25th day of October, A. D., 1922, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Ninth Circuit for the reasons set forth in the assignment of errors filed herewith and it prays that its appeal be allowed and that citation be issued as provided by law, and that a transcript of the record proceedings and papers upon which said decree was based, duly authenticated, be sent to the United States Circuit Court of Appeals for the Ninth Circuit.

HIGH E. McELROY,
Solicitor for Complainant.
Residence: Boise, Idaho.

ORDER ALLOWING APPEAL.

And now, to-wit: On this 8th day of November,

1922, it is ordered that the foregoing petition be granted and that the appeal be allowed as prayed for and that plaintiff file a bond on appeal in the sum of \$200, with good and sufficient security, to be approved by the Court.

FRANK S. DIETRICH,
District Judge.

Endorsed: Filed Nov. 8, 1922.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

ASSIGNMENT OF ERROR.

Now comes the defendant in the above-entitled cause and files the following assignment of errors upon which it will rely upon its prosecution of the appeal in the above-entitled cause, from the decree made by this Honorable Court on the 25th day of October, 1922.

First.

The Court erred in making the order filed on August 22, 1922, for the dismissal of the Bill of Complaint.

Second.

The Court erred in making and entering the decree in said action on the 25th day of October, 1922.

Third.

The Court erred in holding as a part of the said order mentioned in the first specification, that the cost of the proposed drainage works, referred to therein, constituted a part of the annual maintenance or operation charges of the Boise Project under the terms of Sec. 5 of the Act of Congress approved August 13, 1914 (38 Stat. 686), commonly known as the Reclamation Extension Act, or at all.

Fourth.

That the Court erred in holding as a part of said mentioned order, that the cost of the proposed drainage works, referred to therein, did not constitute an increase of the construction charges of Boise Project under the terms of Sec. 4 of the said Act of Congress commonly known as the Reclamation Extension Act, or at all, and was not governed by the provisions of said section.

Fifth.

That the Court erred in holding as part of said mentioned order that the Hon. Secretary of the Interior could announce or determine the amount of said drainage charge, or any part of the operation or maintenance charge of Boise Project, as a flat rate per acre.

Sixth.

That the Court erred in holding that Subsection (b) of Exhibit "C" attached to the Bill of Com-

plaint constitutes a sufficient determination or announcement of an annual operation or maintenance charge for the Boise Project under the terms of Section 5 of said Reclamation Extension Act.

WHEREFORE, the appliant prays that said decree be reversed and that the District Court be directed to overrule Defendant's motion to dismiss and to proceed with the hearing of said Court according to law and the rules of procedure governing the disposition of equitable causes.

HUGH E. McELROY,
Solicitor for Complainant.
Residence: Boise, Idaho.

Endorsed: Filed Nov. 8, 1922.

W. D. McREYNOLDS, Clerk.

By Pearl E. Zanger, Deputy.

(Title of Court and Cause.)

BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS that we, Nampa & Meridian Irrigation District, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound under the above-named defendant in the sum of \$200, for the payment of which well and truly to be made, we bind ourselves and our successors and assigns, jointly and severally, firmly by these present.

Sealed with our seal and dated this 8th day of November, 1922.

The condition of this obligation is such, that whereas, the above-named Nampa & Meridian Irrigation District, has prosecuted an appeal to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the decree made and entered in the above-entitled suit in the District Court of the United States for the District of Idaho, Southern Division, on the 25th day of October, 1922.

Now therefore if the above-named Complainant and Appliant, Nampa & Meridian Irrigation District, shall prosecute its said appeal to affect and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and effect.

NAMPA & MERIDIAN IRRIGATION
DISTRICT.

By Hugh E. McElroy,
Solicitor.

UNITED STATES FIDELITY &
GUARANTY CO. OF BALTI-
MORE, MARYLAND,

By Henry Whitson,
Attorney in Fact.

(Corporate Seal)

Approved November 8, 1922.

Dietrich, Judge.

Endorsed: Filed Nov. 8, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

MOTION.

Complainant respectfully represents to the Court:

1. That it has perfected an appeal from the decree allowing the motion of the defendant for a dismissal of the Bill of Complaint and filed its praecipe with the Clerk for the transcript on appeal and defendant has consented to the terms of said praecipe.

2. That the Solicitors for Intervenorors have filed a praecipe requesting the Clerk to include in said transcript a copy of the Complaint in Intervention filed by Intervenor.

3. That the Complainant objects to the inclusion of said copy of the Complaint in Intervention in said transcript for the reason that the same is not material to said appeal and would impose heavy and unnecessary expense on Appellant.

Wherefore, a difference having arisen between said parties concerning the general contents of the said record, Complainant hereby submits the same to the Court for determination under sub-section (c) of Rule 75 of the Rules of Practice for courts of

equity of the United States and prays the Court for an order covering the same.

HUGH E. McELROY,
Solicitor for Complainant.
Residence: Boise, Idaho.

Service by copy acknowledged this 7th day of December, 1922.

ELDREDGE & MORGAN,
Solicitors for Intervenor.

Endorsed: Filed Dec. 8, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR FURTHER TRANSCRIPT
SUGGESTED BY INTERVENOR.

TO THE HONORABLE W. D. McREYNOLDS,
CLERK OF THE ABOVE ENTITLED COURT:

You will please prepare and incorporate in the record on appeal of the plaintiff and appellant, Nampa & Meridian Irrigation District in the above entitled cause, the bill of complaint in intervention, filed by Payette-Boise Water Users' Association, Ltd., intervenor.

Dated this 7th day of December, 1922.

ELDREDGE & MORGAN,
Solicitors for Intervenor.
Residence: Boise, Idaho.

Due service of the above and foregoing praecipe for further transcript suggested by intervenor and

receipt of copy is hereby admitted this 7th day of December, 1922.

HUGH E. McELROY,

Endorsed: Filed Dec. 7, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

STATEMENT FOR THE RECORD.

Pursuant to order of the Court, Payette-Boise Water Users' Association, Ltd., filed a complaint in intervention in said cause, filed a motion to dismiss, embodied in the complaint in intervention and presented a written brief on the hearing of the motion to dismiss and set out, as a part of its complaint in intervention, a large number of exhibits, including what is known as Exhibit "X" in the record of the Payette-Boise Water Users' Association, Ltd., vs. J. B. Bond, et al., and referred to in the bill of complaint by the Nampa & Meridian Irrigation District and which said Exhibit "X" was omitted from the record in the bill of complaint but was referred to therein, as aforesaid, and which said Exhibit "X" was before the Court when it rendered its decision in said cause;

That said Exhibit "X", forming a part of this statement, constitutes a part of the contract between the Government of the United States, bearing date the 12th day of July, 1921, being the contract of which the complainant in this cause com-

plaintains and seeks to set aside and the Payette-Boise Water Users' Association, Ltd., intervenor herein; that the complaint in intervention contained a large number of exhibits and upon praecipe being filed by intervenor for further record, asking that the whole of said bill of complaint in intervention be incorporated in the record, a hearing was had thereon upon objection of the complainant in this cause and the Court ordered that the complaint in intervention, in chief, together with Exhibit "X", as aforesaid, be incorporated in the record on appeal; that the following complaint, together with Exhibit "X", constitutes the complaint proper in the Court below and the particular Exhibit "X" incorporated therein, as aforesaid.

(Title of Court and Cause.)

COMPLAINT IN INTERVENTION.

Leave of Court first being had Payette-Boise Water Users' Association, a corporation, files its complaint in intervention, and for ground of complaint alleges and states:

I.

That at all times herein mentioned plaintiff was and is a corporation duly organized and existing under and by virtue of the laws of the State of Idaho with its principal place of business at Caldwell, Idaho.

II.

That plaintiff is interested and affected by the controversy involved in said cause, and is a necessary and indispensable party to the final determination of said cause for the reasons hereinafter stated.

III.

That on or about the 13th day of February, 1906, plaintiff herein entered into a certain contract with the Government of the United States, a copy of which marked Exhibit "A" is hereto attached and made a part hereof.

IV.

That under and by virtue of the terms of said contract, intervenor for and on behalf of its members contracted and agreed with the United States for the construction of the irrigation works known as the Boise Project, covering approximately 143,000 acres of land within Ada and Canyon Counties, State of Idaho; that of said 143,000 acres approximately 40,000 acres of which lie within the Nampa & Meridian Irrigation District, plaintiff in this cause, and that said 40,000 acres is identical in description with the 40,000 acres described in paragraph 4 of the complaint on file herein.

V.

That under and by virtue of said contract of February 13, 1906, intervenor herein became guar-

antor for the return of the construction charge of the United States of America of the moneys expended and to be expended by the Government of the United States in the construction of the Boise Project under and by virtue of the terms of said contract; that said Boise Project in pursuance of said contract was by the Secretary of the Interior, acting by the United States, duly constructed.

VI.

That the members of intervenor are the settlers and land owners upon said Boise Valley Project; that the stockholders and members of this plaintiff have procured all their rights to the use of water from said Government Project under and by virtue of the contracts and decree of Court herein referred to between this plaintiff and the Government of the United States.

VII.

That plaintiff's members and stockholders comprise approximately 2,000 settlers upon what is known as the Boise Project and land owners thereunder.

VIII.

That certain litigation arose between this plaintiff and certain officers of the Reclamation Service, and that in settlement of said controversy that a certain contract between the plaintiff herein and the Government of the United States, bearing date of the 12th day of July, 1921, was entered into;

that among other things under and by virtue of the terms of said contract being referred to as a supplemental contract, intervenor herein became the guarantor of all payments provided for to be made by the settlers upon the Boise Project to the United States under and by virtue of said supplemental contract; that large sums of money under the terms of said contract have been collected from the various members of plaintiff herein for a drainage construction, and a large sum of which has been expended in the construction of drainage works.

IX.

That under and by virtue of the contract of June 1, 1915, Exhibit "A" to plaintiff's complaint, between the Nampa & Meridian Irrigation District and the United States of America, said Nampa Irrigation District contracted and agreed to pay the same maintenance and operation charge per acre as announced by the Secretary of the Interior for similar lands upon the Boise Project proper; that drainage is a proper and necessary maintenance charge in that a large acreage upon the Boise Project is rapidly becoming water-logged and seeped so that without drainage a large acreage of said Project will become permanently water-logged and seeped, and the productivity of the land destroyed, and that said seeped and water-logged land can not return to the Government of the United States a proper or any construction charge.

X.

That under and by virtue of said contract, Exhibit "A" to plaintiff's complaint, a large sum of money was charged against the Boise Project outside of the Nampa & Meridian Irrigation District, and for which lands outside of the Nampa & Meridian Irrigation District are paying and have been paying for drainage within the Nampa & Meridian Irrigation District.

XI.

That it is inequitable to permit the Nampa & Meridian Irrigation District to receive and retain such benefits to the expense of the Project lands outside of the Nampa & Meridian Irrigation District, which it is doing and has done, and avoid contribution to the expense of the drainage on Project lands outside of the said district.

XII.

That a large majority of the settlers, members of this intervenor, have executed the new form of water right application provided for in said supplemental contract between the United States of America and this intervenor, bearing date of the 12th day of July, 1921, wherein and whereby the members of this intervenor, relying upon the provisions of said contract to the effect that the United States of America would assess for drainage purposes all of the project lands within the Nampa & Meridian Irrigation District equally and ratably with that of the

lands outside of the irrigation district for drainage purposes belonging to the members of this intervenor, so executed said form of water right application in which it is provided, among other things, that the members of this intervenor would pay a drainage charge as levied by the Secretary of the Interior.

And for other and further defense to plaintiff's complaint, intervenor alleges and states:

I.

That plaintiff's complaint does not state facts sufficient to constitute a cause of action or to entitle plaintiff to equitable relief or any relief, and for that reason and upon that ground intervenor moves to dismiss plaintiff's complaint in said cause.

II.

That the United States of America is a necessary and indispensable party to this proceeding, in that by this action it is sought to abrogate a contract made with the United States of America, and is not a proceeding to prevent the violation of a contract made by the United States, and for that reason and upon that ground, intervenor further moves the Court to dismiss plaintiff's cause of action.

III.

That a copy of said supplemental contract, bearing date of the 12th day of July, 1921, between the United States of America and this intervenor,

marked Exhibit "B", is heretofore attached and made a part hereof; that said contract was made for and on behalf of the members of this plaintiff.

WHEREFORE, Intervenor prays judgment, that:

A. That plaintiff's cause of action be dismissed.

B. That intervenor have judgment for its costs in this behalf expended.

C. That intervenor have such other and further relief as may appear equitable and just in the premises.

ELDREDGE & MORGAN,
Attorneys for Intervenor.
Residing at Boise, Idaho.

(Duly verified)

*In the District Court of the United States, for the
District of Idaho, Southern Division.*

PAYETTE-BOISE WATER USERS' ASSO-
CIATION,

Plaintiff,

vs.

D. W. COLE, C. C. FISHER, CHAS. F.
WEINKAUF, RIVERSIDE IRRIGATION
DISTRICT, PIONEER IRRIGATION DIS-
TRICT AND NAMPA & MERIDIAN IRRI-
GATION DISTRICT,

Defendants.

STATEMENT OF COST AND CONDITIONAL
DEDICATION OF IRRIGATION WORKS,
BOISE IRRIGATION PROJECT, IDAHO.

To the Above Named Court:

The following statement of Cost and Conditional Dedication of Irrigation Works, in connection with the Boise Federal Irrigation Project, in Idaho, is presented for filing in the above-named case;

STATEMENT OF CASE.

Gross Cost:

Gross cost of construction of the
Project to June 30, 1919.....\$12,696,331.87

Note: This figure is taken from project books; in arriving at same, the cost of equipment and plant was not charged but depreciation only was charged. Receipts from sale and transfer of equipment in excess of appraised values at completion of work were credited to cost. A detailed statement of cost to June 30, 1917, has been furnished as Defendants' Exhibit No. 54. Any additional information desired in regard to items or feature costs may be ascertained by reference to the project books which have been offered in evidence and are available in the Boise Project office. The difference between the cost to June 30, 1917, as shown in Defendants' Exhibit No. 54 and the gross cost to June 30, 1919, as stated above, is nearly all covered by items, no part of which is charged to the project lands, *i. e.*, Riverside Drainage \$91,821.44 and Notus Canal \$121,523.44.

Equipment:

Add amount carried as value of
equipment undisposed of and adjust-
ments on account of sales at less than
appraised value 35,816.69

\$12,732,148.56

Construction Credits:

Deduct construction credits, other than power receipts (power receipts are credited to the power plant which is reserved and is not charged to project lands)	725,424.59
	<hr/>
	\$12,006,723.97

Over-distribution operating accounts:

Deduct over-distribution on operating accounts	1,201.42
	<hr/>

Net construction cost.....	12,005,522.55
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Surveys and investigations:

Deduct surveys and investigations on unconstructed units, itemized below	43,783.36
	<hr/>
	\$11,961,739.19

Storage on Weiser River	\$ 918.96
Snake and Columbia Rivers	82.81
Reconnaissance on Wood River	168.95
Storage reconnaissance on Payette.....	267.44
Succor Creek reconnaissance	214.63
Miscellaneous preliminary expenses	188.30
North Side Boise surveys	5,494.15
Payette Unit surveys	10,600.23
Succor Creek tract surveys	1,080.15
Stream measurement Payette River	2,169.13
Stream measurement Succor Creek.....	1,097.89

Water filings, Pay-	
ette River	450.90

Subtotal	\$22,733.54
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Surveys proposed ex-	
tensions on North	
and South Sides	
Boise River in 1916	21,049.82

	<u>\$43,783.36</u>
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Arrowrock Reservoir:

Cost of Arrowrock Reservoir.....	\$4,601,183.82
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Note: Difference between \$4,601,183.82 and \$4,750,000 referred to in public notice of July 2, 1917, is due to the fact that the equipment and construction plant were disposed of to better advantage than estimated at the time of public notice, and that the credit for certain construction earnings, such as profit on mercantile store and mess at Arrowrock has been transferred to the Arrowrock feature, making it possible to reduce the net cost of the reservoir to \$4,601,183.82.

Net cost, excluding Arrowrock Reservoir:

Net cost of project, excluding Ar-	
rowrock Reservoir	\$7,360,555.37

Drainage Construction:

Above figures include following items for drainage construction, part of which is chargeable to project land, and part paid by irrigation districts:

Pioneer Irrigation District.....	\$298,397.63
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Nampa & Meridian Irrigation District:

Old water right lands, \$151,206.38	
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Project lands	158,139.56
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	<u>\$309,345.94</u>
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Riverside Irrigation District.....	91,821.44
Drainage on project proper outside of districts, mainly Fargo Basin and Deer Flat.....	77,189.43

Subtotal drainage\$776,754.44

Note: Proportion of drainage construction to be charged to project lands consists of the \$77,189.43 drainage on project proper and the item of \$158,139.56 in the Nampa & Meridian Irrigation District, being the proportionate charge to project lands as agreed to in contract dated June 1, 1915 between the U. S. the Nampa & Meridian Irrigation District and the Payette-Boise Water Users' Association.

Total Drainage construction charged to
project lands\$235,328.99

Drainage cost to be collected from dis-
tricts and not charged to project lands:

Pioneer District.....	\$298,397.63
Nampa & Meridian District old lands.....	151,206.38
Riverside Irrigation District lands.....	91,821.44
Total drainage de- duction	\$541,425.45

\$6,819,129.92

Notus Canal:

Deduct cost of work on Notus Canal to July 1, 1919.....	121,523.44
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\$6,697,606.48

Power Plant:

Deduct value of power plant at Boise Diversion Dam reserved for pump- ing water to proposed extensions.....	195,305.27
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\$6,502,301.21

Deer Flat Reservoir:

Deduct 2% of Deer Flat Reservoir reserved to supplement water supply of Notus sub-unit extension, (2% about \$1,000,000) approximately	20,000.00
	<hr/>
	\$6,482,301.21

Main Canal:

Deduct 1% of cost of Main Canal from Boise River to Deer Flat Reservoir (1% of \$2,000,000) approximately	20,000.00
	<hr/>
	\$6,462,301.21

Suit in Court of Claims:

Add contingent liability in suit of Contractor in Court of Claims, Page and Brinton v. United States	325,931.97
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Net Cost, exclusive of Arrowrock Storage:

Net cost to be charged to project lands exclusive of Arrowrock storage.....	\$6,788,233.18
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Irrigable Area:

Maximum possible irrigable area of new or project lands under the constructed unit, about.....	140,000 acres
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Notes: The term "project lands" as used herein refers to lands under the constructed unit of the project and having no water rights from private canals, as distinguished from old water right lands having a partial water supply from private canals for which supplemental storage rights have been contracted under agreements between the various irrigation districts and canal companies, and the United States. Of the 140,000 acres of project land

above referred to, about 40,000 acres are located in the Nampa & Meridian Irrigation District, and about 400 acres in the Settlers' Irrigation District.

In the past year about 1500 acres of sandy, rough land have been deducted as not practicable for irrigation, also 1500 acres which have become seeped. The 140,000 acres referred to above includes about 8,000 acres of extremely rough, sandy land which it is doubtful whether it is practicable to irrigate, also a considerable area of land which will probably become non-irrigable on account of seepage, also lands held by owners not qualified to secure government water rights under the act on account of non-residence and excess ownership. Loss in acreage of from 10 to 25% on account of seepage has been common on other projects. How much of the seeped area can be reclaimed by drainage is uncertain. It is also uncertain whether any funds will be available for the construction of drainage works, and also as to the effectiveness of drainage works, when constructed and what lands will remain seeped after drainage construction.

Estimated acreage which will ultimately be found unsuitable for irrigation on account of the sandy and rough condition of certain lands and the seepage of other lands10,000 acres

Estimated net acreage of irrigable project lands under the canal system of the constructed unit.....130,000 acres

Cost per acre of works, other than Arrowrock reservoir, chargeable to project lands if payments are se-

cured from the entire 130,000 acres	\$ 52.22
50% of Arrowrock reservoir to be charged to project lands (50% of \$4,601,183.82) \$2,300,591.91 or a charge per acre, if payments are made from the entire 130,000 acres of	17.70
Charge per acre, provided all project lands are covered by contracts through organization of irrigation districts or otherwise, approximately	\$70.00

Explanatory Statement:

Unless irrigation districts or some form of organization capable of binding all the lands should be formed, it will be necessary to depend upon individual applications or contracts, the making of which is largely optional with the individual land owners. Without district organizations binding all lands, it is estimated that a considerable percentage of the land owners will avoid paying the government for a water right by picking up waste water, or securing water in some other way or holding the land for speculation without irrigation. Consequently, it is estimated that a charge of approximately \$70 per acre will be necessary if districts are organized and contracts made, binding all irrigable project lands to pay for a water right, and a charge of \$80 per acre without such organization. That is, it is estimated that a payment of \$70 per acre from all project lands guaranteed by an irrigation district having the taxing power en-

abling it to assess all the lands would bring in a total revenue or payment equal to the amount which would be collected by a charge of \$80 per acre upon such of the project lands as the owners thereof may elect to purchase water rights for.

Estimating the available capacity of Arrowrock Reservoir at about 268,000 acre-feet (approximately the amount of stored water drawn out of Arrowrock during the irrigation season of 1919), the storage capacity of Arrowrock Reservoir to be dedicated to the project lands of the constructed unit would be 134,000 acre-feet, and estimating that about $\frac{2}{3}$ of the 130,000 acres of project lands is located above Deer Flat Reservoir and will be supplied with water from Arrowrock Reservoir, and about $\frac{1}{3}$ is located below Deer Flat Reservoir and is supplied from Deer Flat Reservoir, the amount of Arrowrock storage capacity dedicated to the project lands supplied therefrom amounts to about $1\frac{1}{2}$ acre-feet per acre reservoir capacity, provided water rights are purchased for the entire area.

Approximately 58,000 acre-feet have been sold to supplement the water rights on the old lands of the Boise Valley under the canals of the several irrigation districts and companies with which contracts have been made, including the lands of the shareholders of the New York Canal Co. The balance amounting to about 76,000 acre-feet is reserved for future sales and proposed extensions of the project.

If the members of the Payette-Boise Water Users' Association desire a larger proportion of the Arrowrock Reservoir and are willing to pay for same. an application to purchase a right to the use of additional capacity out of the reservoir will be considered if an acceptable application for the same is made prior to the sale or dedication of the water to other lands.

The figure for cost in above statement includes a proportion of cost of detached or general office prorated to the various features on the basis of cost to each feature. The amount and details of such overhead cost to June 30, 1917, are shown in statement introduced in the trial of this case as Defendants' Exhibit 55. The cost of general offices is proportioned to all projects monthly by transfer, debiting all projects under way, and crediting the general office accounts. The basis of distribution is the ratio each project expenditure for the month bears to the total expenditure for the whole service for the same period. Secondary projects, or those on which investigations only are being made, received their proportion of overhead which remains a part of the cost of such investigations.

About three-fourths of the overhead cost of the Boise Project is charged to the portion of the works dedicated to the project lands of the constructed unit. The greater part of the overhead expense shown on Exhibit No. 55 is the expense of the

Boise Project office and consists of work done on the Boise Project directly and exclusively for the benefit of that project. The Supervising Engineer's office was also located on the Boise Project and handled engineering and supervisory work for that project. The Chicago office was a transportation and central purchasing office. Much of the time of that office was taken up in making purchases and forwarding shipments for the Boise Project. In 1915, the employment of Supervising Engineers was discontinued and thereafter the work previously handled by the Supervising Engineers was concentrated in the office of the Chief of Construction at the Denver office and is referred to in Exhibit No. 55 as the Denver Office Expense. The Washington office handled engineering, legal, clerical, accounting, correspondence, and general office work for each of the various projects of the Reclamation Service. The method of prorating the expenses of the detached offices at Washington, Denver and Chicago, to the several projects in proportion to the total expenditures of each project, was adopted as the most practical and economical method of distribution and one giving results not differing greatly from what would have been obtained by keeping track of the times of each employee devoted to each item of work for each of the several projects, the latter method, while possible, would have been very expensive and cumbersome. General administrative work carried on in the of-

office of the Secretary of the Interior has not been charged to any project.

CONDITIONAL DEDICATION OF IRRIGATION WORKS.

Subject to the payment of charges and compliance with regulations as required by law and authorized regulations of the Secretary of the Interior, and insofar as the dedication of irrigation works owned by the United States and not yet paid for by the Water Users is authorized by law, the following irrigation works are dedicated to the said project lands in the constructed unit, including the project lands in the Nampa & Meridian Irrigation District:

- (a) Right to the use of 50% of the storage capacity of Arrowrock Reservoir.
The said project lands to be entitled to 50% of the water actually available from said reservoir each year.
- (b) Right to the use of all of the distribution system, except the power plant and Notus Canal and 1% of the main canal.
- (c) Right to the use of 98% of storage capacity of Deer Flat Reservoir.
It is understood, however, that pursuant to the provisions of Sec. 6 of the Act of Aug. 13, 1914, (38 Stat., 686) no land owner or water user shall be entitled to receive water when in arrears for more than one year in the payment of any construction or operation and maintenance charge.

The said project lands of the constructed unit are not paying for any part of the 50% of Arrowrock Reservoir not dedicated to said project lands and shall have no right, title or interest to the said 50% or the water available therefrom, nor the 2% of the Deer Flat Reservoir reserved to supplement the supply of water for land under the Notus Canal.

The power plant at the Diversion Dam is reserved and not charged or dedicated to the project lands and the project lands shall have no interest therein.

Pursuant to Sec. 6 of the Reclamation Act of June 17, 1902, (32 Stat., 388), title to all irrigation works remains in the United States until further Act of Congress, and the management and operation of the irrigation works will remain in the United States until payments have been completed for the major portion of the lands irrigated by the waters of said works unless prior to said time the operation and maintenance thereof shall be turned over to the water users by the Secretary of the Interior pursuant to an agreement therefor under the provisions of Sec. 5 of the Act of Congress approved Aug. 13, 1914 (38 Stat., 686).

The right to enlarge any of the existing irrigation works of the project and to use or dispose of any additional capacity made available by any enlargement or improvement hereafter constructed by the United States is reserved.

Under the contract between the United States and the Pioneer Irrigation District the United States has the right to substitute water from Deer Flat Reservoir or other source of supply under the control of the United States in lieu of an equal amount of Arrowrock water to which the district is entitled. As there is more storage capacity in Deer Flat Reservoir in proportion to the acreage to be served than in Arrowrock Reservoir, such substitution may be desirable at times and the right to make such substitution is reserved. In the event of such use of Deer Flat water the Arrowrock water for which such Deer Flat water is substituted will be available for the project lands.

This dedication is made for the purpose of compliance with opinion and decision of the Court in the above entitled case, and should the said decision be reversed or modified by the final decision of the Supreme Court or Circuit Court of Appeals in said case, the Secretary of the Interior reserves the right to cancel or withdraw the said dedication and terminate all rights provided thereunder and in that event to proceed as may be lawful or proper in accordance with the determination of the Supreme Court or other appellate court rendering a final decision in said case.

Recommended for approval.

(Sgd.)

A. P. DAVIS,

*Director and Chief Engineer U. S.
Reclamation Service.*

APPROVED

Oct. 24, 1919.

(Sgd.) FRANKLIN K. LANE,

Secretary of the Interior.

(ORDER)

Approved with instructions to Clerk to incorporate in record on appeal.

FRANK S. DIETRICH,

Judge.

December 16, 1922.

Endorsed: Lodged Dec. 15, 1922.

Filed Dec. 16, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

PRAECIPE FOR TRANSCRIPT ON APPEAL.

To W. D. McReynolds, Clerk of the Above Entitled Court:

You will please prepare the record on the appeal of the Plaintiff and Appellant, Nampa & Meridian Irrigation District, taken in the above entitled cause from the decree and order made and entered in said cause on the 25th day of October, 1922, such record to consist of the pleadings, documents and papers in the following order:

1. Bill of Complaint.
2. Motion of Defendant to Dismiss Bill of Complaint.

3. Decision of the Court on Motion to Dismiss Complaint Filed August 22, 1922.

4. Decree of the Court Dismissing Complaint and Action Filed October 25, 1922.

5. All papers filed in connection with this appeal, viz: Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Bond on Appeal, Citation, and this Praecipe.

In preparing the above record you will please omit the title of all pleadings except Bill of Complaint, but in lieu thereof insert the words "Title of Court and Cause," to be followed by the name of the pleading or instrument. You will also please omit the verification of all pleadings, but in lieu thereof insert, whenever the pleading is verified, the words, "Duly Verified."

We have conferred with counsel for appellees and he requests us to advise you that he waives the time allowed him in which to designate additional parts of the record for inclusion in the printed transcript, and consents that the same may be printed forthwith and in accordance with the foregoing Praecipe.

Dated this 27th day of November, 1922.

HUGH E. McELROY,

Solicitor for Complainant and Appellant.

Boise, Idaho, November 27, 1922.

We hereby acknowledge receipt and service of copies of the foregoing Praecipe for Transcript on

appeal and waive time to designate additional parts of the record for inclusion in the printed transcript and consent that the same may be printed forthwith and in accordance with the foregoing Praeceptum.

Dated this 27th day of November, 1922.

E. G. DAVIS,

B. E. STOUTEMYER,

Solicitors for the Defendant.

Boise, Idaho, November 28, 1922.

We hereby acknowledge receipt and service of the foregoing Praeceptum on Appeal by copy, reserving all rights as to time and to ask for further record.

ELDREDGE & MORGAN,

Solicitors for Intervenor.

Endorsed: Filed Dec. 4, 1922.

W. D. McREYNOLDS, Clerk.

(Title of Court and Cause.)

CITATION.

THE UNITED STATES OF AMERICA,—ss.

To J. B. Bond, Project Manager of Boise Project of the United States Reclamation Service, Defendants, and Payette-Boise Water Users Association, Ltd., Intervenor:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, State of California, within

thirty (30) days from the date of this Writ, pursuant to an appeal filed in the Clerk's office of the District Court of the United States, District of Idaho, Southern Division, wherein Nampa & Meridian Irrigation District is Complainant and you, J. B. Bond, Project Manager of Boise Project of the United States Reclamation Service, are Defendant and Payette-Boise Water Users' Association, Ltd., is Intervenor, to show cause, if any there be, why the order and decree in said appeal mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable Frank S. Dietrich, United States District Judge for the District of Idaho, this 20th day of November, A. D. 1922, and of the Independence of the United States the one hundred and forty-sixth year.

FRANK S. DIETRICH,

ATTEST:

District Judge.

W. D. McREYNOLDS, Clerk.

(SEAL)

Service of the foregoing citation and receipt of copy thereof admitted this 28th day of November, 1922.

B. E. STOUTEMYER,

Solicitor for Defendant.

ELDREDGE & MORGAN,

Solicitors for Intervenor.

Endorsed: Filed Dec. 4, 1922.

W. D. McREYNOLDS, Clerk.

CLERK'S CERTIFICATE.

I, W. D. McReynolds, Clerk of the District Court of the United States for the District of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 122, inclusive, to be full, true and correct copies of pleadings and proceedings in the above entitled cause, and that the same, together constitute the transcript on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, as requested by the Praecipes for such transcript and directed by order of the Court.

I further certify that the cost of the record herein amounts to the sum of \$141.25 and that the same has been paid by the appellant.

Witness my hand and the seal of said Court this third day of January, 1923.

W. D. McREYNOLDS,

(Seal)

Clerk.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

2

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

VS.

J. B. BOND, Project Manager of Boise Project of the
United States Reclamation Service,
Defendant,

PAYETTE-BOISE WATER USERS' ASSOCIA-
TION, Ltd., Intervenor,
Appellees.

BRIEF OF APPELLEE, J. B. BOND,
PROJECT MANAGER.

FILED
FEB 12 1925
P. D. MONKTON,
CLERK

HUGH E. McELROY,
Solicitor for Appellant.

E. G. DAVIS and

B. E. STOUTEMYER,
*Solicitors for Appellee, J. B. Bond, Project Manager
Boise Project, U. S. Reclamation Service.*

ELDRIDGE & MORGAN,
*Solicitors for Appellee, Payette-Boise Water Users'
Association, Ltd.*

No.....

IN THE

United States Circuit Court of Appeals For the Ninth Circuit

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

vs.

J. B. BOND, Project Manager of Boise Project of the
United States Reclamation Service,
Defendant,

PAYETTE-BOISE WATER USERS' ASSOCIA-
TION, Ltd., Intervenor,
Appellees.

BRIEF OF APPELLEE, J. B. BOND,
PROJECT MANAGER.

HUGH E. McELROY,
Solicitor for Appellant.

E. G. DAVIS and

B. E. STOUTEMYER,
*Solicitors for Appellee, J. B. Bond, Project Manager
Boise Project, U. S. Reclamation Service.*

ELDRIDGE & MORGAN,
*Solicitors for Appellee, Payette-Boise Water Users'
Association, Ltd.*

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NAMPA & MERIDIAN IRRIGATION DISTRICT,
Appellant,

vs.

J. B. BOND, Project Manager of Boise Project of the
United States Reclamation Service,
Defendant,

PAYETTE-BOISE WATER USERS' ASSOCIA-
TION, Ltd., Intervenor,
Appellees.

BRIEF OF APPELLEE, J. B. BOND,
PROJECT MANAGER.

1. The Complainant alleges the making of a certain contract dated June 1, 1915, between the United States and the Nampa & Meridian Irrigation District, a copy of which is attached to the Complaint as Exhibit 'A'. Section 12 of the contract is question provides, among other things:

“The project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the

Interior for similar lands for the Boise Project and the same shall be collected by the District for the United States and paid over by the District to the United States, and upon notice from the officer of the United States in charge of the Boise Project, the District will withhold the delivery of water from such project lands in the District as are in default in the payment of said operation and maintenance charge."

2. The Bill of Complaint further alleges that on February 15, 1921, the Secretary of the Interior issued a Public Notice assessing a special operation and maintenance charge for drainage purposes against all the project lands of the Boise Project, including the 40,000 acres in the Nampa & Meridian Irrigation District. A copy of the Public Notice in question is attached to the Complaint as Exhibit "C", and is in words and figures as follows:

"

PUBLIC NOTICE

(No. 6) .

BOISE PROJECT, IDAHO-OREGON

Department of the Interior,
Washington, D. C., February 15, 1921.

1. ANNUAL OPERATION AND MAINTENANCE CHARGE FOR DRAINAGE.—
In pursuance of Section 4 of the National Reclamation Act of June 17, 1902 (32 Stat. 388) and of Acts amendatory thereof, or supplementary thereto, particularly the Extension Act of August 13, 1914, (38 Stat. 686) an-

nouncement is hereby made that the annual operation and maintenance charge for the irrigation season 1921 and until further notice against all lands of the Boise Project under Public Notice (except the One Thousand Eight Hundred (1,800) acres, more or less in the State of Oregon) shall be divided into two parts:

(a) A regular operation and maintenance charge to be hereafter announced in the usual manner to cover all costs of operation and maintenance other than drainage.

(b) A special operation and maintenance charge for drainage purposes of One Dollar (\$1.00) per irrigable acre per year until further notice, to become due and payable Fifty (50c) cents per irrigable acre on April 1, 1921, and Fifty (50c) cents per irrigable acre on October 1, 1921, and Fifty (50c) cents per irrigable acre on March 1st and October 1st of each year thereafter until further notice, the money received from such special operation and maintenance charge to be used after the same has been paid in to the United States, in providing drainage on the Boise Project to minimize or prevent as far as possible the swamping and water-logging of the lower lying lands of the project by seepage from the irrigation of the higher lands and by seepage from the irrigation system of the project, to lessen the damage which would otherwise result from the operation of said canal system and to maintain the irrigability of the lands of the project, said drainage charge to be considered a part of the minimum operation and maintenance charge per irrigable acre, the remainder of said minimum charge per acre and all charges per acre-foot of water used in ex-

cess of the amounts of water allowed for such minimum charge to be hereafter announced and determined by Public Notice to be hereafter issued from time to time.

JOHN BARTON PAYNE,
Secretary of the Interior."

(Pages 44 and 45 of Transcript).

3. The Complaint further sets out that the Secretary of the Interior has made investigations for and authorized the construction of a drainage system on the Boise Project outside of the Nampa & Meridian Irrigation District for the drainage of lands located in what is known as the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project where several thousand acres of land are in immediate danger from the ground water which is now within five (5) feet of the surface and steadily rising.

4. The Complainant alleges in paragraphs 10 and 11 of the Bill of Complaint (pages 10 and 11 of the transcript):

"10. That as a result of irrigation from the said irrigation system of the Boise Project the water table is rapidly rising under portions of the Boise Project outside of the Nampa & Meridian District, particularly in the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project, and that in the opinion of the officials of the United States Reclamation Service it has become necessary to construct a drainage system in said portions

of the project in order to prevent the lands thereof from being ruined by seepage and alkali. That the Secretary of the Interior has caused to be made surveys and investigations of a proposed drainage system for said lands and has caused investigations to be made of the seepage and ground water conditions under said portions of the project, from which it appears that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided, said lands will suffer irreparable injury from seepage and water-logging."

"That the Secretary of the Interior has approved the said proposed drainage system and has authorized the construction thereof as a part of the operation and maintenance work of the Boise Project with funds to be collected for that purpose from the water users as an operation and maintenance charge."

"11. That for the purpose of providing the necessary funds for the construction of said drainage system as aforesaid the Secretary of the Interior on February 15, 1921, issued a public notice, copy of which is hereto attached and made a part hereof, and marked Exhibit 'C'."

5. The Complainant alleges that the funds to be collected under the Public Notice quoted above are to be used in the construction of said proposed drainage system in the Golden Gate, Wilder, Arena and Deer Flat sections of the project outside of the Nampa & Meridian Irrigation District, that the

assessment levied by the Secretary of the Interior for the purpose of providing such drainage system is not a lawful or proper operation and maintenance charge, and that as a matter of law the Secretary of the Interior is without authority to levy such charge against the 40,000 acres of project lands in the Nampa & Meridian Irrigation District as an operation and maintenance charge.

6. The Complainant further alleges that the Complainant, Nampa & Meridian Irrigation District, has refused to pay this charge and that the Defendant, J. B. Bond, the Project Manager of the Boise Project, has threatened and unless restrained by an order of this Court will refuse to deliver water to the said project lands in the District on account of the refusal of the District to pay the said operation and maintenance charge for drainage purposes.

7. The Complainant asks relief of the Court in the form of a mandatory injunction to require the Project Manager to continue the delivery of water to the project lands in the District notwithstanding the failure and refusal of the District and the project landowners of the District to pay the said operation and maintenance charge for drainage purposes.

8. The Complainant has attached to the Complaint, in addition to the two contracts between the

United States and the District, the Public Notice of February 15, 1921, and copy of the Decree in the case of Payette-Boise Water Users' Association v. J. B. Bond, together with the Stipulation, Contract and other papers attached to that Decree.

9. The Defendant filed a motion to dismiss on the ground that the Bill of Complaint fails to state any cause of action in equity, or any ground for equitable relief. The motion to dismiss was sustained by the District Court and a Decree of Dismissal entered from which the Complainant has appealed to this Court.

10. This record presents two questions:

1st. Is it within the power and discretion of the Secretary of the Interior, under the law, to provide necessary drainage in a federal reclamation project, as an operation and maintenance charge, in order to prevent the project from destroying itself in whole or in part by seepage from the irrigated lands, and from the canal system of the project, this being in many cases the only way in which the necessary drainage can be provided?

2nd. If it is thought that in the absence of contract the Secretary would not have such power under the law, and yet this is a question on which reasonable men, even learned judges might differ in their opinions, and the Appellant has agreed to accept the decision of the Secretary of the Interior

by agreeing to pay the same charge for th project lands in the District which the Secretary shall announce for the project lands outside of the District, and the Secretary has decided this question by announcing the charge in question as a part of the operation and maintenance charge for the project lands outside of the District, and in making such decision has acted in good faith and without fraud (no fraud being charged) is not the Appellant bound by its agreement to accept this decision of the Secretary and to pay the same charge applicable to the project lands outside of the District?

11. We think that both these questions must be answered in the affirmative, but if either of them is answered in the affirmative, the decision of the lower court sustaining the motion to dismiss, is correct.

12. Whatever arguments may be offered by Counsel, the conclusion is unavoidable, that Appellant's demand in this case is a demand for preferential treatment under which, if the Appellant is successful, the project lands in the District would be given a very much lower charge than is required of the project lands outside of the district.

13. This is contrary to the intent of the parties as expressed in the contract (see paragraph 12 of contract, pages 28, 29, 30 and 31 of transcript), and is also contrary to the dictates of good public

policy applicable alike to private irrigation projects, irrigation districts, and government projects.

“We do not apprehend that rental charges for the use of water from irrigating canals is based upon the actual expenses of carriage and delivery to each consumer. If that were true, the rate charges to the land owner at the upper end of the main canal would be comparatively insignificant, while the rate charged to the man who lives at the extreme end of the canal, fifty or sixty miles from its intake, would be so enormous and exorbitant as to prohibit its use and make agricultural pursuits an impossibility with him. This is not the theory on which water rates are established.”

Niday v. Barker, 16 Idaho 73, 101 Pac.
254.

Colburn vs. Wilson, 24 Idaho 104, 132
Pac. 579.

14. In the case of Colburn v. Wilson, reported in the 24 Idaho 104, 132 Pac. 579, the Supreme Court of Idaho said, in regard to the proper distribution of maintenance charges in an irrigation district:

“In making such assessment it was intended by the legislature that in the annual assessment for maintenance and operation of the water system the lands irrigable under the system within the district should be considered as a whole and such lands must be assessed at the same rates where the benefits—

that is, the water needed and received—are the same.”

15. The District Court was in harmony with the Supreme Court of Idaho and with the general doctrine applicable everywhere when it said in this case:

“But in so reasoning sight is lost of a fundamental characteristic of all irrigation systems constructed under either the state or the federal laws. Such a project is an indivisible unit, the burden of constructing and maintaining which is apportioned ratably to all lands receiving water therefrom. A water user cannot divide a system into its component parts and decline to pay his share of the cost of constructing or maintaining, or of operating, those portions from which he receives no direct benefit. If a wasteway at the lower end of a system, or a drainage ditch, is essential to the lawful and efficient maintenance and operation of the system, it is properly to be regarded as a part of the system and a water user near the head can no more consistently decline to pay his ratable share for its construction and maintenance than he could decline to pay for the lower portion of the main canal, or for laterals that do not serve his lands. When the drainage ditches within the plaintiff district were constructed for the plaintiff lands they were correctly treated a part of the irrigation system, and quite as correctly their cost was distributed ratably to all the the lands without consideration of the question of direct benefit.”

(Pages 82 and 83 of transcript).

16. The Appellant argues that by reason of the contract between the Appellant District and the United States the 40,000 acres of project lands within the boundaries of the District has been segregated from the remainder of the project and constitutes in effect a separate project, or separate unit, which cannot be charged any part of the cost of providing necessary drainage in other parts of the project.

17. Appellant's position is especially inequitable under the facts of this case, because, when the Plaintiff lands referred to as the project lands of the District, were themselves in need of drainage, it was successfully argued that these lands were a part of the project and not segregated therefrom as a separate unit or project, and therefor that the cost of draining the project lands of the District should not be charged to such lands alone but to the project as a whole.

18. The District contains 24,557 acres of old water right lands irrigated from the Ridenbaugh and other old canals (page 17 of transcript) (also paragraph 3 of Bill of Complaint, page 7 of transcript), and about 40,000 acres referred to "project lands" and irrigated entirely from the Government irrigation system of the Boise Project (see paragraph 3 of Complaint, pages 7 and 8 of transcript).

19. Paragraph 1 of the contract (page 19 of the transcript) provides:

“That as a part of the general drainage system of its Boise Project, the United States will construct for the Nampa & Meridian Irrigation District, a drainage system to a total cost of Five Hundred Fifty-seven Thousand Dollars (\$557,000.00).”

And in paragraph 3 of the contract (pages 21 and 22 of the transcript) it is provided:

“That the District will pay to the United States for that portion of the above described drainage work in the District, equity chargeable to the old water right lands in the District, the sum of Two Hundred Sixty-six Thousand Dollars (\$266,000).”

“No portion of said sum of Two Hundred Sixty-six Thousand Dollars (\$266,000) shall be apportioned to the project lands in the District but the balance of the said sum to be expended on drainage works in the District as provided in paragraph 1 hereof shall be charged to the general expense of the Boise Project and the project lands in the District shall pay the construction, operation and maintenance charges provided in paragraphs 11 and 12 hereof.”

So the difference between \$557,000 and \$266,000 or \$291,000 was the amount to be contributed by the Boise Project as a whole toward the drainage of the 40,000 acres of project lands in the District. On account of the fact that the drainage system in the District was completed at less than the estimator cost, and cost \$340,000 instead of \$557,000,

as originally estimated, the charge both to the old water right lands of the District and to the Boise Project was reduced in like proportion to One Hundred Sixty-two thousand three hundred sixty-nine and eighty-four/hundredths (\$162,369.84) Dollars, and One Hundred Seventy-seven thousand Six Hundred three and sixteen-hundredths (\$177,603.-16) Dollars respectively.

(See pages 35 and 36 of transcript).

20. So the lands in the lower half of the Boise Project in what is known as the Deer Flat, Golden Gate and Arena sections of the project which are now in need of drainage, have paid and are still paying a part of the cost of draining the project lands of the District.

21. It appears to be the position of the owners of the project lands in the District that when they need drainage they are a part of the Boise Project, and other parts of the project should help pay for their drainage, but when they have been drained and other parts of the project need drainage, then it is claimed that they are segregated as a separate unit and should pay nothing toward the drainage of other parts of the project.

22. Counsel's suggestion that by reason of the contract between the District and the United States the District lands have been excluded from the project or segregated as a separate unit entitled to

a lower charge is not supported by the language of the contract. Under this contract a different collection agency was provided for collecting the charges from the lands in the District from that employed outside of the District, but it is plain that the lands in the District were not excluded from any of the benefits of the project (see paragraph 11 of contract, page 27 of transcript) and it is equally plain that it was intended that the project lands in the District were to pay the same for the water which they were to receive (see paragraph 12, pages 28, 29, 30 of transcript), and this was particularly true of the expense in connection with or growing out of the operation of the project, for it was agreed, that "the project lands in the District shall pay the same operation and maintenance charge per acre as announced by the Secretary of the Interior for similar lands of the Boise Project." One of the results of the operation of the project is the swamping of certain lands by seepage from the project canals and irrigation on the highest lands of the project, and the drainage in question is an expense necessary in order to enable the Secretary of the Interior to continue the operation of the project works for the benefit alike of the lands in the District and out of the District without destroying a large part of the project lands. (See paragraph 10 of Bill of Complaint, pages 10 and 11 of transcript). The very name used in the contract to des-

ignite the plaintiff lands, namely, "project lands" in the District implies that they are a part of the project and not excluded from it.

23. We find no support for Appellant's assertion on page 4 of its brief that the jurisdiction of the Secretary to make this contract is found in Section 5, Act of Congress of August 13, 1914, known as the Extension Act. The contract itself refers to the Act of Congress of June 17, 1902 (32 Stat. 388) (Reclamation Act), and the Act of Feb. 21, 1911 (36 Stat. L. 925) (Warren Act), as the Acts under which the contract is made. (See page 17 of transcript). It is designated as Draft of July 24, 1914, and appears to have been prepared and submitted before the Act of August 13, 1914 was passed, although signed after the date of that Act.

24. Similar contracts were made in earlier years and some of them have been passed upon by the Courts and held to be within the authority of the Secretary under the provisions of the Reclamation Act.

Pioneer Irr. Dist. v. Stone, 23 Idaho 344,
130 Pac. 382.

Hillcrest Irr. Dist. v. Brose, 133 Pac. 662,
24 Idaho 376.

25. With reference to the same contract here involved, the Supreme Court of Idaho said in

Nampa & Meridian Irrigation District v. Petrie,
28 Idaho 227, 163 Pac. 425:

“That the Secretary of the Interior has the power to enter into a contract to supply water to an irrigation district under the provisions of the Act of Congress of June 17, 1902, known as the Reclamation Act (32 Stat. at L. 388; 7 Fed. Stats .Ann. 1098; U. S. Comp. St. 1913, Secs. 4700-4708), we think there can be no doubt. If there was any doubt of the authority of that official to enter into such contracts, it was clearly removed by the Act of Congress of February 21, 1911, known as the Warren Act (36 Stat. at L. 925, Sec. 2 (U. S. Comp. St. 1913, Sec. 4739), and the subsequent enactment of Congress passed August 13, 1914, known as the Reclamation Extension Act, chapter 247, Sec. 7, 38 Stat. 688).”

Nampa & Meridian Irrigation District v.
Petrie, 28 Idaho 227, 163 Pac. 425.

Some additional authority may be found in the Extension Act of 1914, but the decisions are uniform in holding that the Secretary had ample authority under the Reclamation Act and Warren Act before the Extension Act was passed.

26. Neither does the contract support Counsel's assertion that a part of the project works have been turned over to the District under Section 5 of the Extension Act. The United States has employed the District to perform the last step in the distribution of the Government water to that

part of the District lands lying under the Ridenbaugh Canal, but pays the District for this service just as it would any other contractor or employee and collects the same Operation and Maintenance charge from these lands as from the other project lands.

27. But it is not material whether this contract is considered as coming under the Reclamation Act, the Warren Act, or the Extension Act, or under all three of these Acts for there is no more reason under the one Act than the other for giving a lower charge to the project lands of the District than is required of the project lands outside of the District.

28. We will take up in order the two questions necessary to be decided in this case:

1st. Is it within the power and discretion of the Secretary of the Interior, under the law, to provide necessary drainage in a federal reclamation project, as an operation and maintenance charge in order to prevent the project from destroying itself in whole or in part by seepage from the irrigated lands, and from the canal system of the project, this being in many cases the only way in which the necessary drainage can be provided?

2nd. If it is thought that in the absence of contract the Secretary would not have such power

under the law, and yet this is a question on which reasonable men, even learned judges might differ in their opinions, and the Appellant has agreed to accept the decision of the Secretary of the Interior by agreeing to pay the same charge for the project lands in the District which the Secretary shall announce for the project lands outside of the District, and the Secretary has decided this question by announcing the charge in question as a part of the operation and maintenance charge for the project lands outside of the District, and in making such decision has acted in good faith and without fraud (no fraud being charged) is not the Appellant bound by its agreement to accept this decision of the Secretary and to pay the same charge applicable to the project lands outside of the District?

29. It is evident that the answer to the first of these questions will be very far-reaching in its results affecting not the Boise Project alone, but all Reclamation projects.

30. There are very few extensive irrigation projects on which drainage does not sooner or later become necessary. Where the seepage arises before the public notice is issued, as it did in the Nampa & Meridian District, the cost of the necessary drainage may be provided as a part of the construction cost, but if the seepage condition arises after the public notice has been issued, as will most often be the case, and the construction charge has

been definitely and finally fixed by public notice and cannot be increased to provide for additional drainage, it will generally be true that drainage cannot be provided at all unless it can be provided as an operation and maintenance charge.

31. The Appellant points to Section 4 of the Reclamation Extension Act of August 13, 1914 (38 Stat. 686) which provides:

“Sec. 4. That no increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water right applicants and entrymen to be affected by such increase, whereupon all water right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto.”

and suggests that by an agreement between the Secretary of the Interior and a majority of the project settlers the additional drainage could be provided as an increased construction charge.

32. But if 20 or 25% of the project land is being swamped with water seeping from the irrigation canals and the higher irrigated lands of the project, or any other percentage less than half, as will usually be the case, and the 75 or 80% who do not need drainage are controlled by motives of self interest, as men usually are, it would obviously be impossible for the 20 or 25% who need the drainage to out-vote the 75 or 80% who do not,

and there is also this additional objection—that no additional construction funds will be available for such work even if a majority of the settlers were ready to contract for it, unless Congress appropriates additional Government money for that purpose, and Congress may very well refuse to appropriate additional Government money to make good the damage resulting from the operation of the project, which it would seem should more properly be taken care of by the project itself.

33. Consequently, in many cases if the drainage cannot be provided as an operation and maintenance charge, it cannot be provided at all, which would lead not only to heavy losses to the settlers whose lands are being swamped by seepage from the operation of the project, but also to a diminution of the Reclamation Fund itself,

“A result which Congress did not intend.”

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1143, for swamped lands which are incapable of producing crops cannot be expected to return construction charges.

34. At the time the contract in question was made neither the state laws applicable to irrigation districts, nor the Federal laws applicable to Federal Reclamation projects, contained any provision expressly authorizing the construction of drains either by irrigation districts or by the Secretary of

the Interior, but in both cases it has been decided that the power exists as incidental to the power to furnish water for irrigation and we think that the decisions of the courts plainly indicate that the power to provide drainage grows out of the duty of the United States, or the District, as a canal owner, to so operate and maintain its canal system that the same will not destroy the property of others, and if this can be accomplished most effectively and economically by providing a system of drains to remove the surplus water brought upon the land by the operation of the irrigation system, then such drainage may be considered as incidental to the operation and maintenance of the irrigation system.

35. The Circuit Court of Appeals for the Eighth Circuit said in the case of *United States v. Ide*, 277 Fed. 382:

“It is well settled that the plaintiff may construct drainage works as a part of its irrigation system. *Bisset v. Pioneer Irr. Dist.*, 21 Idaho, 98, 120 Pac. 461; *Pioneer Irr. Dist. v. Stone*, 23 Idaho, 344, 130 Pac. 382; *Nampa & Meridian Dist. v. Petrie*, 28 Idaho, 227, 153 Pac. 425; *G. G. Burt et al Drainage Dist. v. Farmers’ Co-operative Co.*, 30 Idaho 752, 168 Pac. 1078. The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts. *Ness v. Fisher*, 223 U. S. 691, 32 Sup. Ct. 356, 56 L. Ed. 610; *Knight v. U. S. Land Association*, 142 U. S.

161, 12 Sup. Ct. 258, 35 L. Ed. 974; *Noble v. Union River Logging Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123 (1893); *U. S. v. Minidoka & W. R. Co.*, 190 Fed. 491, 111 C. C. A. 323 (1911); *Stalker v. O. S. L. Ry. Co.*, 225 U. S. 142, 32 Sup. Ct. 636, 56 L. Ed. 1027 (1912); *U. S. v. O'Neill (D. C.)* 198 Fed. 680; *U. S. v. Burley (C. C.)* 172 Fed. 617; *tSate ex rel. Megler v. Forrest, Commissioner of Public Lands*, 13 Wash. 268, 43 Pac. 51, (1895); *U. S. v. Doherty (D. C.)* 27 Fed. 730; *U. S. v. Schurz*, 102 U. S. 375, 26 L. Ed. 167; *Cosmos Exploration Co. v. Gray Eagle Co.*, 190 U. S. 301, 23 Sup. Ct. 692, 47 L. Ed. 1064; *Riverside Oil Co. v. Hitchcock*, 190 U. S. 317, 23 Sup. Ct. 698, 47 L. Ed. 1074; *U. S. v. Speed*, 8 Wall 77, 83, 19 L. Ed. 449; *Earnshay, v. U. S.*, 146 U. S. 60, 13 Sup. Ct. 14, 36 L. Ed. 887; *Bates v. Payne*, 194 U. S. 107, 24 Sup. Ct. 595, 48 L. Ed. 894."

United States vs. Ide, 277 Fed. 382.

36. The first case cited by the Circuit Court of Appeals for the Eighth Circuit in support of the statement that, "It is well settled that the plaintiff may construct drainage works as a part of its irrigation system", is the irrigation district case of *Bissett v. Pioneer Irrigation District*, 21 Idaho 98, 120 Pac. 461, in which the Supreme Court of Idaho said:

"The law clearly authorizes the formation of irrigation districts and procuring a sufficient supply of water for such purposes. If in the course of performing this work, seepage and percolating waters from the canal system flood and overflow the lowlands of land

owners within the district, the district is certainly under an obligation to take care of such seepage or overflow and protect such land (Stuart v. Noble Ditch Co., 9 Idaho 755, 76 Pac. 255) and it would seem that the district would have the implied power to take such steps as would be necessary in order to protect landowners from damage or the loss of the use of their lands."

Bissett v. Pioneer Irr. Dist., 21 Idaho 98,
120 Pac. 461.

37. In the case of Pioneer Irrigation District v. Stone, 23 Idaho 344 (130 Pac. 832). the Supreme Court of Idaho held:

"Under the laws of this state, an irrigation district may provide for the drainage and reclamation of lands within the district which have been flooded or water-logged by reason of overflow percolation, or seepage from its irrigation works, and the accomplishment of such purpose is one of the necessarily implied duties of the district equally as incumbent on the district as the irrigation of its dry and arid lands."

Pioneer Irr. Dist. v. Stone, 23 Idaho 344,
130 Pac. 382.

And in the same case also decided:

"Upon the question of whether or not in irrigation district has a right to provide means and expend money for the drainage of overflowed lands within the district, this Court, in the case of Bissett v. Pioneer Irrigation

District, 21 Idaho 98, 120 Pac. 461, expressed the opinion that such action might be taken. While the views there expressed were not essential to the determination of that case, a further investigation of the question convinces us of the correctness of the impressions the Court then had on the subject and we adopt the views therein expressed as the opinion of this Court and hold that an irrigation district possesses the powers necessary to drain its overflowed lands and to protect its landowners from seepage and overflow waters as well as to supply water to the dry and arid lands of the district."

Pioneer Irr. Dist. v. Stone, 130 Pac. 382,
23 Idaho 344.

38. In the case of Burt, et al., Com. Drainage District No. 1 v. Farmers Cooperative Company, et al., 30 Idaho 752, 168 Pac. 1078, the Supreme Court of this state made the following statement in regard to the policy of the state in regard to drainage in connection with irrigation projects:

"It seems in this irrigated country the question of drainage is now confronting almost every irrigated section, and there seem very cogent reasons for a return to the former rule above stated (referring to the common law rule hereafter stated), at least to the extent of assessing lands for the construction of a drainage system from which seepage or percolation damages or injuries other lands. The early settlers of the arid regions were not confronted with the question of drainage, but time and experience have proven that a drainage

system is absolutely necessary where large areas of desert land are reclaimed by irrigation."

"It is a well recognized fact that under many of the irrigation systems of our state thousands of acres of land which were reclaimed from an arid condition and which for a time produced valuable crops have now become alkalined or water-logged and thus ruined, and grow nothing but willows and tules because of the seepage of waters from canals and the irrigation of higher lands. And it certainly is not the public policy of the state to permit thousands, if not hundreds of thousands of acres of lands that were once productive to be ruined and made worthless, and leave the owners thereof remediless."

Burt, et al., com. Drainage Dist. No. 1 v.
Farmers Coop. Co., et al., 30 Idaho
752, 168 Pac. 1078.

In the same case the Court stated the principle involved under the Drainage District Laws of this state as applied to irrigation projects, in the following language:

"The law permitting high lands irrigated by artificial means which are responsible in part for the swampy condition of lower lands to be assessed for a portion of the cost of constructing the drainage works is an exercise of that power whereby the legislature provides the means and methods by which one may so use his own property as not to injure that of another."

Burt, et al., Com. Drainage Dist. No. 1 v.
Farmers' Coop. Irr. Co., et al., 30
Idaho 752, 168 Pac. 1078.

39. From these cases it would appear to be the opinion of the Supreme Court of this state that drainage on an irrigation project, especially where the water-logged condition is due in part to the seepage from the irrigation system, is incidental to the operation and maintenance of the canal system and is a means by which the owners and beneficiaries of the canal system may enjoy the advantages of irrigation from that system without doing damage to others.

40. In the case now before the Court the project lands of the Nampa & Meridian Irrigation District are the equitable owners or beneficiaries of a four-fourteenths interest in the irrigation system of the Boise Project by means of which their lands are made productive and valuable. It would seem to us that there is no injustice in requiring as a condition to the enjoyment of this benefit, that they contribute to such measures as are necessary to prevent the operation of this system from becoming the means of destroying the property of other landowners, and this appears to be especially equitable in the case of the project landowners in the Nampa & Meridian Irrigation District in view of the fact that their lands have already been drained at the expense of the project as a whole.

41. Since it is evident that in many cases at least drainage cannot be provided at all unless it can be provided as an operation and maintenance charge, all the reasons which lead to the conclusion that drainage may be provided under the Reclamation Act apply with equal force to sustain the argument that drainage may be provided as an operation and maintenance charge.

42. In Section 5 of the Reclamation Act it is provided that the entryman must, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes. It is evident that Congress intended that the land should be reclaimed, and we submit, that to convert and an arid waste into a useless swamp and leave it in a condition as worthless as it was in the beginning, would not be reclamation. Reclamation is a broader term than irrigation. In fact, in California, where most of our irrigation law originated, "Reclamation Districts" for drainage purposes preceded irrigation districts and when the question of the constitutionality of the irrigation district law was raised the decisions in regard to such Reclamation Districts for drainage purposes were cited in support of similar powers for irrigation purposes.

Fallbrook Irr. Dist. v. Bradley, 164 U. S.
112, 41 L. Ed. 369.

43. The term "Reclamation" has always been understood as implying drainage as much as irrigation. Kinney in his work on irrigation discusses the question of drainage in connection with irrigation as follows:

"The drainage of irrigated lands, and lands which lie below where irrigation operations are being carried on, has become almost as great a question from an economic standpoint, in many localities, as is the application of the water to the lands for irrigation. In the early history of irrigation, the lands adjoining the streams were first taken up and upon these irrigation operations were first commenced. These lands lying close to the natural streams required but little artificial drainage. But as time has gone on, the lands higher up and farther back from the stream were taken up and also irrigated. After this, it was found that the first farms were becoming too wet, caused by the seepage from the irrigation above them. This process has been repeated; and as still higher lands were irrigated, in many instances, the first farms upon the lower lands have become practically swamps. It therefore naturally follows that, in order to develop these sections of the country to their full capacity, and not to retard their progress where they have been once developed, the question of the drainage of these lands has become one of great economic importance. In fact, the two questions of irrigation and drainage must go hand in hand where this condition exists."

Kinney on Irrigation and Water Rights
(2nd Ed.) par. 38, page 57.

44. Part of the water used for irrigation is used up in evaporation from the land and plant growth ,but a part seeps or percolates down into the subsoil and if the natural drainage is insufficient to carry off this percolating water, the land will inevitably be swamped in a few years and become worthless and unproductive unless a system of drainage is constructed in connection with the irrigation system to take off the surplus water placed on the land through irrigation.

45. The Supreme Court has declared that it was the intention of Congress that the Secretary of the Interior should collect the Government money invested under the Reclamation Act, without diminution.

Swigart v. Baker, 229 U. S. 187, 57 L.
Ed. 1143.

But if the land is allowed to become seeped and worthless and the Secretary of the Interior is not permitted to mploy the necessary means to prevent or remdy this condition, the security for the Government's investment would be lost and how could the secretary collect the money invested? To allow the land to become swampd and unproductive would defeat the entire purpose of the Reclamation Act. The expected reclamation of arid land, the increase in food production, the building of more homes on the land, and the increased prosperity

and well-being of the whole country, which was expected to result from such reclamation, would not be accomplished and the money invested by the Government could not be collected from worthless and unproductive land.

46. Since Congress has imposed on the Secretary of the Interior the duty to accomplish two purposes, the reclamation of arid land, and the recovery of the money invested, it would be most unreasonable to suppose that Congress intended to deny him the right to use the best and in many cases the only means by which the required objects can be accomplished.

47. The Appellant makes its argument for exemption from contribution to the cost of providing drainage in other parts of the project by offering a very strict construction of the term "maintenance" thus

"In 'Words and Phrases' under head of 'maintain' we find:

"The word 'maintain' has been defined as meaning to support that which has already been brought into existence. *Kendrick and Roberts vs. Warren Bros. Company*, 72 Atl. 461, 464;'

"'Maintain' is defined to mean, to hold or keep in a particular state or condition, especially in a state of efficiency.' *Kovachoff vs. St. Johns Lumber Company (Ore.)* 121 Pac. 801, 803.' "

and then jumping to the conclusion contrary to the language of the statute that it is not the project as a whole, but only the irrigation works which we are to "support", "sustain", and "not suffer to decline". Many courts give the term "maintenance" a broader meaning as will be shown in the cases cited later in this brief, but if we assume that it means only upkeep and forget for the time being the companion term "operation", and the fact that the drainage here involved is necessary to remedy the damage which is admittedly the result of the operation of the project works, still counsel flies in the face of the language of the statute when he jumps to the conclusion that it is only the upkeep of the irrigation or drainage system itself which may be considered in determining the operation and maintenance charge and not the upkeep of the project as a whole, for the statute (Sec. 5, Act of Congress Aug. 13, 1914, 38 Stat. 686) provides:

"Section 5. That in addition to the construction charge, every water right applicant, entryman or landowner, under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the *project*."

The term "project" is a broader term than the term "irrigation system" or "drainage system" and includes the irrigable lands as well as the irriga-

tion works, so if the term "maintenance" is considered as synonymous with "upkeep", as counsel asserts, it is the upkeep of the project which is to be considered and for which the maintenance charge is to be levied.

48. Now with this provision of the statute in mind let us consider whether the proposed drainage system is, or is not, necessary for the upkeep of the project and the project lands. On this point the Bill of Complaint sets out in paragraph 10 as follows:

"10. That as a result of irrigation from the said irrigation system of the Boise Project the water table is rapidly rising under portions of the Boise Project outside of the Nampa & Meridian Irrigation District, particularly in the Golden Gate, Wilder, Arena and Deer Flat sections in the lower half of the project, and that in the opinion of the officials of the United States Reclamation Service it has become necessary to construct a drainage system in said portions of the project in order to prevent the lands thereof from being ruined by seepage and alkali. That the Secretary of the Interior has caused to be made surveys and investigations of a proposed drainage system for said lands and has caused investigations to be made of the seepage and ground water conditions under said portions of the project, from which it appears that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided,

said lands will suffer irreparable injury from seepage and water-logging."

Surely when Complainant alleges:

"that several thousand acres of land in said sections are in immediate danger from the ground water table which is now within five (5) feet of the surface and steadily rising, and that if drainage is not provided, said lands will suffer irreparable injury from seepage and water-logging,"

counsel cannot claim that the project will be kept up, or will remain in the same statu quo without this drainage.

49. Counsel for the District has called the Court's attention to the fact that the Reclamation Extension Act was passed prior to the signing of the contract between the United States and the District. This being the case, the District must be presumed to have known that under the statute the operation and maintenance charge which the Secretary would announce and which the District agreed to pay, was to be an operation and maintenance charge for the maintenance of the project, including the irrigable lands and not merely the operation and maintenance of the irrigation works, for such is the language of the statute. That the term "project" as used in connection with the Federal Reclamation Laws includes the lands as well as the works is shown by numerous statements of the courts in practically all of the cases referring to

the Reclamation Act. For instance, in the recent opinion by Chief Justice Taft in the case of *Irvin v. Webb*, 66 L. Ed. 333 (advance sheets), it is said:

“He averred that he had an interest as a homestead entryman under the general Homestead Act of Congress of May 20, 1862, and the Reclamation Act of June 17, 1902, in land included within the Salt River Reclamation Project.”

Again on page 337 of the same case, the Court said:

“The secretary is authorized to fix a limit of area of land per entry representing the acreage which may reasonably support a family. The secretary is given full power in paragraph 10 to make rules and regulations needed to carry the act into effect. He has done so, under the act and regulations contained in the General Reclamation Circular each entryman is required to conform his entry to a farm unit established by the secretary within each Reclamation project.”

Again in the recent decision of this Court in the case of *Yuma County Water Users' Association v. Schlecht*, reported in the 275 Fed. 889, the Court says:

“The public notice and the letters of the Secretary of the Interior to the association are based upon his determination that the project was completed. His determination was based upon investigation into facts and found support in the opinion of an experienced engineer

and we think that in withdrawing... certain lands and confining the project to the area described in the public notice the secretary exercised discretion and power vested in him under the law."

Yuma County Water Users' Association
v. Schlecht, 275 Fed. 889.

50. There is no lack of authority for holding that the term "maintenance" may include certain items of construction, or at least of improvement.

"Creation of road system.—Const. art. 8, Sec. 9, providing that the Legislature may pass local laws for the 'maintenance' of public roads without the local notice ordinarily required for special laws, is applicable to the Shelby county special road law, which provides for the creation as well as maintenance of a road system. *Ex parte Cooks* (Tex.) 135 S. W. 139, 141."

"As erection.—The word "maintain" ordinarily means to preserve something which is already in existence; but, considering that, by the use of the words 'unless one of them chooses to let his land lie without fencing,' Civ. Code, Sec. 1301, declaring that coterminous owners are mutually bound equally to maintain the boundaries and monuments between them and the fences between them, unless one of them chooses to let his land lie without fencing, applies to land not fenced, it is comprehensive enough, in the light of the subject-matter, to include the erection, as well as the maintenance, of the fences. *Hoar v. Hennessy*, 74 Pac. 452, 454, 455, 29 Mont. 253."

"As *improve*.—In Act June 24, 1895, authorizing the organization of park districts, and providing (section 1) that no portion of such park district should be already included in a park district or in a township whose corporate authorities are authorized by law to levy special taxes or special assessments to maintain a public park, 'maintain' should be construed in the sense of 'improve'; that is, the making of local improvements by special taxation or special assessments for park purposes, since to give the word 'maintain' its strict meaning would render that clause of the statute meaningless, there being at the time the act was passed no law in the state authorizing the corporate authorities of townships to levy special taxes or special assessments to maintain public parks. *People v. Ennis*, 50 N. E. 236, 237, 118 Ill. 530."

51. Most directly applicable to the condition of the Plaintiff is the decision of the Supreme Court of Idaho in the case of *Colburn v. Wilson*, 24 Idaho 104, 132 Pac. 579, which is the leading case in Idaho in regard to operation and maintenance charges in irrigation districts. A careful reading of the decision of the Idaho Court in this case reveals the fact that the operation and maintenance charge which the directors of the irrigation district are authorized to apportion under Section 2407 of the Idaho Revised Codes, which is the same as Section 4384 of the Idaho Compiled Statutes, may include charges for improvements as well as charges for upkeep and the charge involved in the case of

Colburn v. Wilson did include improvements and was sustained by the Supreme Court as lawful and proper, is shown by the following quotations from that case:

“The board of directors of the district levied the annual tax on the lands of the district to cover the necessary expenses for maintaining, operating, repairing and *improving* the property and works of the district for the current year. At such meeting and for such necessary expense the board of directors made a levy extending over all the lands of the district amounting to the sum of \$113,600, which sum was spread equally and not otherwise, to-wit: at the rate of \$5.00 per acre over and upon all the lands of the district.”

“We are of the opinion that Section 2407 is clear and explicit and specially confers jurisdiction on the board to act upon its own judgment and levy an assessment upon all the lands of the district for expenses in maintaining and operating the property of the district, and that such assessment shall be spread upon the lands of the district and shall be proportionate to the benefits received by such lands, growing out of the maintenance and operation of the works of said district. Such jurisdiction having been conferred by the Legislature upon the board in this instance, and the board, having determined and allowed the expenses of *improving* and maintaining the system during the year the assessment is made, and having jurisdiction to make the assessment upon all the lands of the district, should spread the same upon all the lands of the district, and such assessments shall be proportionate to the benefits received by such lands, growing out

of the maintenance and operation of said works of said district according to the judgment and discretion of said board, and no claim being made of any fraud, the determination of the board must be accepted as conclusive.

Shuttuck v. Smith, 6 N. D. 56, 69. N. W. 5."

Colburn v. Wilson, 24 Idaho 104, 132 Pac. 579.

52. There is no sharp distinction between construction expense and operation and maintenance expense. In the leading case under the Reclamation Law, the case of *Swigart v. Baker*, 229 U. S. 187 (57 L. Ed. 1134) the Supreme Court, in giving effect to the intent of Congress, held that although the statute made no reference to the collection of operation and maintenance as such, the provisions of the statute authorizing the collection of the cost of construction included authority to collect operation and maintenance also. In other words, that operation and maintenance is a part of the cost of construction and that it is within the discretion of the Secretary of the Interior to divide the cost of construction, including operation and maintenance, into two parts and designate one of them the "building charge" and the other the "operation and maintenance charge." That is what was done in the case before the Supreme Court in *Swigart v. Baker*, and was the practice under the original Reclamation Act even before the Extension

Act specifically authorized an operation and maintenance charge.

“The Sunnyside Unit of the Yakima Irrigation Project was *so far completed* in 1909 that the Secretary of the Interior gave notice that water would be furnished for irrigation purposes, and that ‘the charges would be in two parts: 1. Building of the irrigation system, \$52 per acre. * * * 2. For operation and maintenance, 95 cents per acre per annum.’ The appellee, Baker, applied for a water right and paid the assessed charges until 1911, when he refused to pay the 95 cents per acre for maintenance and operation on the ground that the secretary had no authority to make such an assessment.”

“In pursuance of this act, various works, including that of the Sunnyside Unit of the Yakima Project, were constructed and notice was given of the charges that would be made. At first they were stated in a lump sum, cost of building, maintenance, and operation making up the total. After 1906, the charges were separately stated substantially thus: ‘1. For building, \$. . . per acre; 2. For maintenance and operation, \$. . . per acre per annum.’ ”

“The contention that this last item could not be assessed against the irrigated land is based upon the fact that Sec. 4 authorizes the secretary to make the estimated charges ‘with a view of repaying the cost of construction of the project.’ But an analysis of the act shows that the charges were not limited to the building of the dam or the digging of the canals, but included the purchase of land needed for

reservoirs and everything chargeable to 'the cost of construction of the project,' which project was later to be turned over as a going concern to the landowners."

"The statute provides that the cost of construction of the project shall be charged against the land within the irrigable limits. The phrase is not expressly defined, and being general in its terms, is not necessarily limited to building, but may include the preservation and maintenance of what has been built. For example, a statute authorizing the levy of a tax to construct a sewer was held to empower the city to levy taxes for its maintenance. Power to construct a dock imposed the duty of operating it. Permission to 'construct internal improvements' warranted the purchase of a plant already built, and authority to construct a road conferred power to maintain it. *Re Fowler*, 53 N. Y. 60; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Atty. Gen. v. Boston*, 142, Mass. 200, 7 N. E. 722; *Pelham v. The B. F. Woolsey*, 16 Fed. 418; *Atchison, T. & S. F. R. R. Co. v. McConnell*, 25 Kan. 372; *Bell v. Maish*, 137 Ind. 226, 36 N. E. 358, 1118; *Weston v. Hancock County*, 98 Miss. 800, 54 So. 307. So, in the present case the statute provides that the secretary may assess 'the cost of construction of the project' without defining the term, and it may assist in arriving at the legislative intent to refer briefly to the facts leading up to the passage of the reclamation act."

Swigart v. Baker, 229 U. S. 187, 57 L. Ed. 1134.

53. However, we do not rest our case on any principle on which there is any division of opinion

among the courts, but revert to the admitted fact that the seepage which makes necessary the drainage expense involved in this case is according to the plaintiff's own allegations the direct result of the operation of the project, and the project works. The drainage work involved in this case is necessary as a means of making restitution for the damage done by the operation of the project. It is a form of reparation in kind in lieu of payment of damages in cash.

54. When land has been destroyed by seepage resulting from the operation of an irrigation system, there are two ways in which the landowner may be compensated for the damage which has been done. He may be paid the value of the land in cash, or a system of drains may be provided to remove the surplus water and restore the land to its former value and usefulness. It can not be argued that any different legal principle is involved if reparation is made in kind rather than in cash, and if this form of reparation is the cheaper plan and also accomplishes the purpose of checking the spread of seepage to other lands and makes it possible for the canal owners to continue the operation of their canal system in the future without destroying the property of others, surely that would be no objection.

55. It occurs to us that the question really involved in the case at bar is the question:

“Is the expense of compensation either in cash or in kind, for the damage resulting from the operation of an irrigation project, or any other kind of a project, an operating expense?”

Here we find the courts entirely unanimous in holding that such an expense is always an “operating expense”.

“The operating expenses of a railroad company should be construed to include a claim for damage done to property by the railroad company in negligently running a train at a highway crossing. *Smith v. Eastern R. Co.*, 124 Mass. 154, 155.”

“Liabilities incurred by the receiver of a railroad for car rentals, for cars destroyed by fire, for rolling stock, equipment and traffic balances due other roads, and for damages for injuries to persons or property caused by torts of the servants of the receiver are legally classed as items of “operating expenses”. *St. Louis Union Trust Co. v. Texas Southern Ry. Co.* (Tex.) 126 S. W. 296, 300.”

To the same effect are:

Green v. Railway Co., 97 Ga. 15, 24 S. E. 814, 33 L. R. A. 806.

24 Am. & Eng. Ency. Law, page 31.

Anderson v. Condict, 93 Fed. 349, 35 C. C. A. 335.

Railway Co. v. Railway Co., 93 Fed. 543, C. C. A. 423.

“They subjected their securities to the expense of operation,—the trustee, by its affirmative act in praying the court to take possession and operate the railway; the holders of the certificates, by the provision of the order authorizing the issuance of the certificates, and which was expressed upon their face, making them subject to the payment of operating expenses and the cost of administration. For that purpose, and to that extent, these parties were vicariously in the possession and operation of the railway through the court as their representative. All liabilities of the receiver were imposed upon the corpus of the property, failing income, as certainly as a mortgagee would be personally liable if he possessed and operated the railway. Technically, perhaps, payment for personal injury cannot correctly be denominated cost of operation; but it is an expense incurred in and by reason of the operation, and as such should be allowed in the accounts of the receiver. *Klein v. Jewett*, 26 N. J. Eq. 474.”

Anderson v. Conduct, 93 Fed 349, 35 C. C. A. 335.

“Damages for personal injuries caused by the negligence of employes are incidental to the operation of every railroad, and may properly be classed as a part of the operating expenses, whether the road is operated by a corporation or a receiver.”

South Carolina & G. R. Co. v. Carolina C. & C. Ry Co., 93 Fed. 543, 35 C. C. A. 423.

56. Surely it will not be held that the Secretary of the Interior may remedy the damage done

by the operation of a Reclamation Project by paying damages in cash and charging the same as a part of the annual operation and maintenance charge, but cannot adopt the cheaper and better plan of providing drainage which will, at less expense, remedy the damage and at the same time furnish protection against future damage of a similar nature so that the operation of the project may be continued hereafter without destroying the property of others.

57. The various Reclamation Laws all give the Secretary of the Interior wide discretion in determining and announcing both the construction charges and the operation and maintenance charges on the various reclamation projects and we think must be held to vest the Secretary of the Interior with the necessary authority to decide debatable questions as to whether certain items of expense in a given case are more properly an operation expense or a construction expense, and that such decision when made without fraud will not be reviewed by the Court even if it were a case in which the Court in the absence of a decision by the Secretary of the Interior, might have reached a different conclusion. The principle involved in such cases has been clearly stated and the authorities compiled and reviewed by the Supreme Court of the United States in the very recent case of *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 63 L. Ed. 717:

"Whether or not the term 'sausage', when applied to the product of the appellee, in which more than the permitted amount of cereal and water is used, is false and deceptive, is a question of fact, the determination of which is committed to the decision of the Secretary of Agriculture by the authority given him to make rules and regulations for giving effect to the act, and the law is that the conclusion of the head of an executive department on such a question will not be reviewed by the courts, where it is fairly arrived at with substantial evidence to support it."

"This rule has been most frequently applied in land department cases, but often also to decisions by heads of other departments."

"Thus, to the action of the Secretary of the Navy in *Decatur v. Paulding*, 14 Pet. 497, 10 L. Ed. 559; to the action of the Secretary of the Interior, on full consideration of the subject, in *Gaines v. Thompson*, 7 Wall 347, 19 L. Ed. 62, and in *Burfenning v. Chicago, St. P. M. & C. R. Co.*, 163 U. S. 321, 41 L. Ed. 175, 16 Sup. Ct. Rep. 1018; and to decisions of the Postmaster General in *Bates & G. Co. v. Payne*, 194 U. S. 106, 48 L. Ed. 894, 24 Sup. Ct. Rep. 595, and *Smith v. Hitchcock*, 226 U. S. 53, 57 L. Ed. 119, 33 Sup. Ct. Rep. 6. The doctrine has been extended by Act of Congress to decisions by the Secretary of Commerce and Labor. *TangTun v. Edsell*, 223 U. S. 673, 56 L. Ed. 606, 32 Sup. Ct. Rep. 359; *Zakonaite v. Wolf*, 226 U. S. 272, 57 L. Ed. 218, 33 Sup. Ct. Rep. 31; *Lewis v. Frick*, 233 U. S. 291, 58 L. Ed. 967, 34 Sup. Ct. Rep. 488."

"The scope of the rule is illustrated by this Court, saying in *Johnson v. Drew*, 171 U. S.

93, 99, 43 L. Ed. 88, 90, 18 Sup. Ct. Rep. 800:

“If there is any one thing respecting the administration of the public lands which must be considered as settled by repeated adjudications of this Court, it is that the decision of the land department upon mere questions of fact, is, in the absence of fraud or deceit, conclusive, and such questions cannot thereafter be relitigated in the courts’.”

“In *New Orleans v. Paine*, 147 U. S. 261, 264, 37 L. Ed. 162, 163, 13 Sup. Ct. Rep. 303:

“In *Noble v. Union River Logging R. Co.*, 147 U. S. 165, 37 L. Ed. 123, 13 Sup. Ct. Rep. 271, we had occasion to examine the question as to when a court was authorized to interfere by injunction, with the action of the head of a department, and came to the conclusion that it was only where, in any view of the facts that could be taken, such action was beyond the scope of his authority. If he were engaged in the performance of a duty which involved the exercise of discretion or judgment, he was entitled to protection from any interference by the judicial power’.”

Houston v. St. Louis Independent Packing Co., 249 U. S. 479, 63 L. Ed. 717.

58. It may be argued by the Appellant that the question here involved is not a question of fact, but we think that it must be held that the question finally decided by the Secretary of the Interior, and necessary to be decided by him, is the question, how much money is it necessary to expend to properly operate and maintain the Boise Project without destroying the property of others, and the

companion question of what charge per acre is necessary to raise the required sum—which certainly are questions of fact. At any rate, the decision that the amount specified in paragraph (b) of the Public Notice of February 15, 1921, is necessary or proper to pay operating expenses, is at least as much a question of fact as is the question whether the term “sausage” is a misnomer for the compound involved in the case of *Houston v. St. Louis Independent Packing Co.*

59. The Circuit Court of Appeals for the Eighth Circuit said with reference to drainage on Federal Reclamation Projects:

“The necessity for drainage and the methods of conducting the work are, in our opinion, in the sound discretion of the Secretary of the Interior, and such discretion cannot be reviewed by the courts.”

United States v. Ide, 277 Fed. 382.

60. The District Court for the Idaho District said in the case of *Payette-Boise Water Users' Association v. J. B. Bond*:

“Seepage is one of the natural incidents of operating the system and it would seem to be plain that the necessary expense of providing drainage to prevent damage therefrom is quite as naturally to be covered by revenues collected for operation and maintenance as any other expense to prevent damage from operation.”

Payette-Boise Water Users' Association
v. Bond, 269 Fed. 169.

61. The decision of the District Court in the Payette-Boise Water Users' Association case, from which the above paragraph is quoted, part of which is reported in 263 Fed. 734 and part in 269 Fed. 159, has been overruled in part by later decisions of this Court, so that it is necessary to consider how far, if at all, the particular question here involved has been affected by the decisions of this Court. The basis of the decision of the District Court in the Payette-Boise Water Users' Association case is shown by the following quotations:

"The first and most sweeping contention of the plaintiff is that upon July 2, 1917, the Secretary was wholly without power to establish rates, for the reason that the time had passed for taking such action, and further that the authority conferred by law, especially by Section 4, above quoted, had been once exercised and was *functus officio*. It urges that under this section the cost is to be estimated and public notice of the apportionment thereof given before the construction of the works and settlement upon the land, and not after, and that it is the 'estimated' rather than the 'actual' cost which is to be returned to the reclamation fund."

"Generally speaking, it is thought that plaintiff's construction of Section 4 of the act is correct."

"In short, from all the evidence I find that the understanding, in substance, was that the

provision of the act requiring the estimate to be made before commencing construction work and before settlement would be waived, and that the settlers would pay the actual cost when and after that should be determined, instead of the estimated cost to be determined by the Secretary in advance."

"Obviously, if as we have found, both parties acted upon the understanding that the obligation of the settlers would be to reimburse the government for its actual outlay, the Secretary is now without discretion touching that matter."

"Under their agreement, the power to declare the actual cost of the project was committed to neither party, and, in the case of a controversy, the question, like other questions of fact affecting the relative property rights of contending parties, is for judicial investigation and determination."

Payette-Boise Water Users' Association v. Cole, 263 Fed. 734.

62. The case of *Yuma County Water Users' Association v. Schlecht* involves the construction of the same statute and the same form of contract involved in the *Payette-Boise* case, except that in the *Yuma* case the contract provided that payment should begin after completion of the project, while in the *Boise* case the contract provided for payments, the first of which "shall be payable when the water is first delivered from said works."

63. The decision of this Court in the *Yuma* case is as follows:

"Section 4 of the Reclamation Act gives authority to the Secretary of the Interior, after determining that an irrigation project is practicable, to cause to be let contracts for the construction work in such portions or section as it may be practicable to construct and complete as parts of the whole project, provided funds are available in the reclamation fund, and thereupon to give public notice of the lands irrigable under the project, of the charges which shall be made per acre upon entries, and upon lands in private ownership capable of being irrigated and the number of annual installments in which the charges shall be paid. The section continues:

" 'The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of * * * the project, and shall be apportioned equitably: Provided,' etc.

"The notice given was in clear accord with the statute, and presumably was based upon data and information then at hand. By estimated cost is not meant the actual exact final sums paid for construction, but rather such sums as it is believed after careful computations will cover the expenses and outlay directly and fairly connected with the construction of the project. The statute contemplates that contracts shall be let prior to the giving of the public notice, and the obvious reason for this is to give to the Secretary of the Interior an adequate knowledge upon which to make an estimate."

"Correspondence such as there was in the present case between the secretary and officials of the Reclamation Service, wherein estimates are considered and discussed in laying out the work prior to the date of the contract between the landowners and the United States, cannot

be regarded as a public notice, nor as in any way binding upon the government. *Utah Light & Power Co. v. United States*, 243 U. S. 389, 37 Sup. Ct. 387, 61 L. Ed. 791. As the whole theory of the statute is that there shall be a return to the reclamation fund of the estimated cost of constructing the project, manifestly the United States should not be found by letters or statements published antecedent to plain agreements made pursuant to the statute. It is unfortunate, that in the Yuma project there was a substantial and material difference between preliminary engineering estimates and the estimate which was made at a later time; but in the absence of some substantial showing that the action of the secretary was fraudulent or arbitrary or so erroneous as to justify an inference of illegality or wrongdoing, it is not within the province of the courts to interfere. *Noble v. Union R. Logging Co.*, 147 U. S. 165, 13 Sup. Ct. 271, 37 L. Ed. 123; *Swigart v. Baker*, 229 U. S. 187, Sup. Ct. 645, 57 L. Ed. 1143; *N. Y. Canal Co. v. Bond* (C. C. A.) 265 Fed. 228."

"Moreover, the contract between the United States by the Secretary of the Interior and the Water Users' Association provides that the association will promptly collect or require payment for that part of the cost of the works which shall be apportioned by the secretary to its shareholders; also that payments for the water rights would be made and enforced by proper means. The fact, therefore, that the cost is greater than was expected cannot be urged now as a ground for equitable relief. *Hihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106."

*Yuma County Water Users' Association
v. Schlecht*, 275 Fed. 885.

64. In the case of Twin Falls Salmon River Land & Water Company v. Caldwell, reported in 272 Fed. 356, this Court held that the decision of the Secretary of the Interior which is implied from his action in authorizing patent for 35,000 acres is that the water supply from the available system is ample for the irrigation of that acreage and that on this question, which covers both the question of the number of acres which may be properly irrigated from the reservoir in question and the duty of water for such lands, the decision of the Secretary of the Interior is conclusive and not subject to review by the Court.

“A stipulation just filed by the parties to this appeal sets forth that a patent has now been issued and delivered by the United States to the State of Idaho for approximately 35,000 acres of land in this project. This action on the part of the federal government establishes the fact that the Secretary of the Interior has determined in effect that an ample supply of water has been provided for the irrigation of 35,000 acres of irrigable land within the project. We must accept that finding as conclusive.”

Twin Falls Salmon River Land & Water Co. v. Caldwell, 272 Fed. 365.

65. In the case of Yuma County Water Users' Association v. Schlecht, this Court cites in support of the decision quoted above, the previous decision of this Court in the case of New York Canal Co.

v. Bond, 265 Fed. 228. The New York Canal Co. case involves the question of the proper operation and maintenance charge to be assessed against the shareholders of the New York Canal Co., under a certain contract between the company and the United States. The statute involved in determining that charge is the same statute covering the question of the operation and maintenance charge to be assessed against the landowners of the Nampa & Meridian Irrigation District, and while there is some difference in the wording of the contract, there is sufficient similarity to make the decision very much in point in the present controversy. In that case the Court reviewed the statute and the contract as follows:

“In order, however, to obtain a better understanding of the controversy, reference should be had to Section 5 of the Act of Congress of August 13, 1914, 38 Stat. 686 (Comp. St. Sec. 4731e), which provides that, in addition to the construction charge, every water right applicant or land owner upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based upon the total cost of operation and maintenance of the project or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered, provided that, when an organized association shall so request, the Secretary of the Interior is authorized in his discretion to transfer the operation and maintenance of all or any part of the project works,

subject to such rules and regulations as he may prescribe. Keeping these several matters in mind, and going back now to Section 16, we find its provisions quite plain. In addition to the charge to be paid by the contract, the company agreed to pay an annual operation and maintenance charge, to be determined and announced by the Secretary of the Interior as provided in Section 5 of the Reclamation Act of August 13, 1914, just referred to. There is also in the contract provision for the irrigation season of 1918 and each year thereafter until further notice, whereby the operation and maintenance charge would be 40 cents per acre-foot for all water delivered to the land described in a certain order after July 1st of each year; also a provision that for 1918 and each year thereafter until further notice by the Secretary of the Interior there should be a minimum operation and maintenance charge of 40 cents per acre for water service after July 1st for each and every irrigable acre in the tract described, whether water was used or not; also provision that if the company paid to the United States, on or before the date when the charge was due, the operation and maintenance charge for the supplemental water supply provided for in the contract, the payments would be subject to a discount as provided by the referred to Act of Congress of August 13, 1914, and if not paid when due penalties might be imposed as provided in Section 6 of that act (Comp. St. Sec. 4731f), and that the—

‘said operation and maintenance charge after July 1st of each year shall cover all water delivered after July 1st out of both supplemental and vested water rights’.”

New York Canal Co. v. Bond, 265 Fed,
228.

66. In both cases the contract leaves the matter of determining the rate to the Secretary of the Interior, but subject in the New York Canal Co. case to the agreement that for the first year the rate should be forty (40c) Cents per acre-foot and subject in the Nampa & Meridian Irrigation District case to the agreement that the rate to be determined by the Secretary of the Interior shall be the same rate determined by the Secretary of the Interior as the operation and maintenance charge for the project lands outside of the district.

67. After reviewing the statute and contract this Court held in the New York Canal Co. case that had the parties not agreed on the forty (40c) cent rate for the year 1918, it would have been the duty of the Secretary of the Interior in his judgment to fix a rate to be charged to the shareholders of the company, and "it is reasonable to say that under the Reclamation Extension Act of August 13, 1914, authority is placed in the Secretary of the Interior to fix charges where the parties have not agreed upon them."

"Reference to the offer contained in the public notice of the Secretary of the Interior is not required, in view of the fact that the parties agreed upon a rate of 40 cents per acre-foot as the maintenance rate in 1918 for all

water delivered after July 1st. *Had they not agreed to that rate, it would have been the duty of the Secretary of the Interior in his judgment to fix a rate to be charged to the shareholders of the company.* Indeed, under Section 8 of the contract of 1906, as well as Section 16 of the contract of July 1, 1918, the parties agreed that the Secretary of the Interior should determine the charges to be made, and it is reasonable to say that under the Rec-location Extension Act of August 13, 1914, authority is placed in the Secretary of the Interior to fix charges where the parties have not agreed upon thm. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 39 Sup. Ct. 332, 63 L. Ed. 717."

New York Canal Co. v. Bond. 265 Fed. 228.

68. The conclusion to be drawn from the decisions of this Court in the Yuma case, the New York Canal Co. case and the Twin Falls Salmon River Land & Water Co. case, is that the determination of the charges to be made, both as to construction charges and as to operation and maintenance charges, is a matter for the judgment and discretion of the Secretary of the Interior and in the absence of fraud, not subject to review by the Court; that it is proper for the Secretary of the Interior to determine and announce such charges in his public notice, and that a public notice issued upon the completion of the project, as was done in the Yuma case, is in full compliance with the re-

quirements of the statute. What then is the application of this rule to the present controversy?

69. The case as now presented is one in which the Secretary of the Interior by issuing his public notice of February 15, 1912, attached to the Complaint as Exhibit "C", has exercised his judgment and discretion in favor of collecting this element of cost as an operation and maintenance charge. Therefore, in order to sustain the Motion to Dismiss it is only necessary to hold that it is within the discretion of the Secretary of the Interior to collect such cost as an operation and maintenance charge and is not necessary to go to the length to which the District Court went in the Payette-Boise Water Users' Association case in which it was virtually held that the Secretary of the Interior could not provide for future drainage in any other way except as an operation and maintenance charge. It appears to us that although the latter theory is not sustained by the decisions of this Court, the former theory that such action is within the discretion of the secretary, is sustained by the cases referred to above.

70. A part of Appellant's Brief (pages 19 and 20) is devoted to the question of construction by the parties, but the record does not disclose whether it has been the general practice of the Secretary of the Interior under the Reclamation Laws to provide for drainage expense as a construction charge,

or an operation and maintenance charge, and so far, at least, as concerns drainage which becomes necessary after public notice has been issued, it would appear that in most cases the drainage would have to be provided as an operation and maintenance charge if it were provided at all.

71. On this point the District Court said:

“Finally it is suggested that until recently it has been customary with the Reclamation Service to carry drainage as a part of construction. I do not stop to inquire touching the correctness of the statement. The facts are not expressly pleaded, and if, so far as concerns this project, we go to the sources from which the facts are to be gotten, we find that at the time the drainage expenditures covered by the plaintiff’s contract were made, the service also included in ‘Construction’ cost, what are admittedly expenses of operation and maintenance. That is to say, during the long period prior to the giving of formal public notice the partially completed system was operated, and in the course of such operation large expenses were incurred over and above the rentals and other income for the same period, and this balance was covered into and charged against construction cost; it follows that a like disposition of the drainage expenditure has little interpretive significance.”

Opinion of District Court—page 88 of Transcript.

THE APPELLANT IS BOUND BY ITS CONTRACT TO ACCEPT THE DECISION OF THE SECRETARY OF THE INTERIOR.

72. We think that the authorities quoted above justify the conclusion that the secretary has authority under the law to provide necessary drainage to remedy the seepage condition which has resulted from the operation of the project, and to charge the cost of such drainage as an operation and maintenance charge.

73. But if it should be thought that in the absence of contract the secretary would not have such power, still the parties may agree to accept the decision of any designated officer or other person and when such person has rendered his decision acting in good faith and without fraud, such decision is final, and is binding upon the parties who have agreed to accept it, and is not subject to review by the Court.

74. The Appellant agreed in this case that the project lands in the District shall pay the same charge announced by the Secretary of the Interior for similar lands of the Boise Project.

75. THE RULE OF LAW APPLICABLE TO SUCH CONTRACTS HAS BEEN STATED BY THE SUPREME COURT MANY DIFFERENT TIMES IN A LONG LINE OF DECISIONS IN WHICH THERE IS NO CONFLICT.

The rule is stated in the case of *United States v. Gleason*, as follows:

“The judgment of an engineer to whom a contract refers the determination of the question of performance can be revised by the Court only upon allegation and proof of bad faith, or of mistake or negligence so gross as to justify an inference of bad faith.”

United States v. Gleason, 175 U. S. 688,
44 L. Ed 284.

Kihlberg v. United States, 97 U. S. 398,
24 L. Ed. 1106.

Merrill-Ruckgaber Co. v. U. S., 241, U. S.
387, 393, 60 L. Ed. 1058.

United States v. Barlow, 184 U. S. 123,
133, 46 L. Ed. 463.

Chicago S. Fe. & Cal. R. R. v. Price, 138
U. S. 185, 193, 34 L. Ed. 917.

Martinsburg & P. R. R. v. March, 114 U.
S. 549, 550, 29 L. Ed. 255.

Sweeney v. United States, 109 U. S. 618
618, 620, 27, L. Ed. 1053.

76. In the case of *Kihlberg v. United States* the Court said:

“The contract, which is the foundation of this action, provides that transportation shall be paid ‘In all cases according to the distance from the place of departure to that of delivery.’ But no specific rule is prescribed for the as-

certainment of distances. The contract is silent as to whether they shall be estimated by an air line, or by the route usually traveled by contractors in conveying government stores, or by the road over which troops ordinarily marched when going from one post or station to another. The parties, however, concurred in designating a particular person, the Chief Quartermaster of the District of New Mexico, with power not simply to ascertain but to fix the distances which should govern in the settlement of the contractor's accounts for transportation. The written order of General Easton to the depot quartermaster at Fort Leavenworth was an exertion of that power. He discharged a duty imposed upon him by the mutual assent of the parties. The terms by which the power was conferred and the duty imposed are clear and precise, leaving no room for doubt as to the intention of the contracting parties. They seem to be susceptible of no other interpretation than that the action of the Chief Quartermaster, in the matter of distances, was intended to be conclusive. There is neither allegation nor proof of fraud or bad faith upon his part. The difference between his estimate of distances and the distances by air line, or by the road usually traveled, is not so material as to justify the inference that he did not exercise the authority given him with an honest purpose to carry out the real intention of the parties, as collected from their agreement. His action cannot, therefore, be subjected to the revisory power of the courts without doing violence to the plain words of the contract. Indeed, it is not at all certain that the government would have given its assent to any contract which did not confer upon one of its officers the authority in question. If

the contract had not provided distinctly, and in advance of any services performed under it, for the ascertainment of distances upon which transportation was to be paid, disputes might have constantly arisen between the contractor and the government, resulting in vexatious and expensive and, to the contractor oftentimes, ruinous litigation. Hence the provision we have been considering. Be this supposition as it may, it is sufficient that the parties expressly agreed that distances should be ascertained and fixed by the Chief Quartermaster, and in the absence of fraud or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment in the premises, his action in the premises is conclusive upon the appellant as well as upon the government. The contract being free from ambiguity, no exposition is allowable contrary to the express words of the instrument."

Kihlberg v. United States, 7 Otto 398-403,
97 U. S. 398, 24 L. Ed. 1106.

77. In the case of Martinsburg & Potomac R. Co. v. March, the Court said:

"As, for this reason, the case must be remanded for a new trial, it is proper to say that, if the declaration had been good on demurrer, we should have been compelled to reverse the judgment for errors in the instructions given to the jury. Several instructions were asked by the defendant embodying the general proposition that the final estimate of the engineer was to be taken as conclusive, unless it appeared from the evidence that, in respect thereto, he is guilty of fraud or intentional mis-

conduct. Those instructions were modified by the court by adding after the words 'fraud or intentional misconduct' the words 'or gross mistake.' This modification was well calculated to mislead the jury, for they were not informed that the mistake must have been so gross, or of such a nature as necessarily implied bad faith upon the part of the engineer. We are to presume from the terms of the contract that both parties considered the possibility of disputes arising between them in reference to the execution of the contract. And it is to be presumed that in their minds was the possibility that the engineer might err in his determination of such matters. Consequently, to the end that the interests of neither party should be put in peril by disputes as to any of the matters covered by their agreement, or in reference to the quantity of the work to be done under it, or the compensation which the plaintiff might be entitled to demand, it was expressly stipulated that the engineer's determination should be final and conclusive. Neither party reserved the right to revise that determination for mere errors or mistakes upon his part."

Martinsburg & P. R. R. v. March, 114 U.

S. 549, 550, 29 L. Ed. 255.

78. This also appears to have been the view of this Court in the case of *Yuma Association v. Schlecht*, where the Court said:

"Moreover, the contract between the United States by the Secretary of the Interior and the Watr Users' Association provides that the association will promptly collect or require pay-

ment for that part of the cost of the works which shall be apportioned by the secretary to its shareholders; also that payments for the water rights would be made and enforced by proper means. The fact, therefore, that the cost is greater than was expected cannot be urged now as a ground for equitable relief. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106."

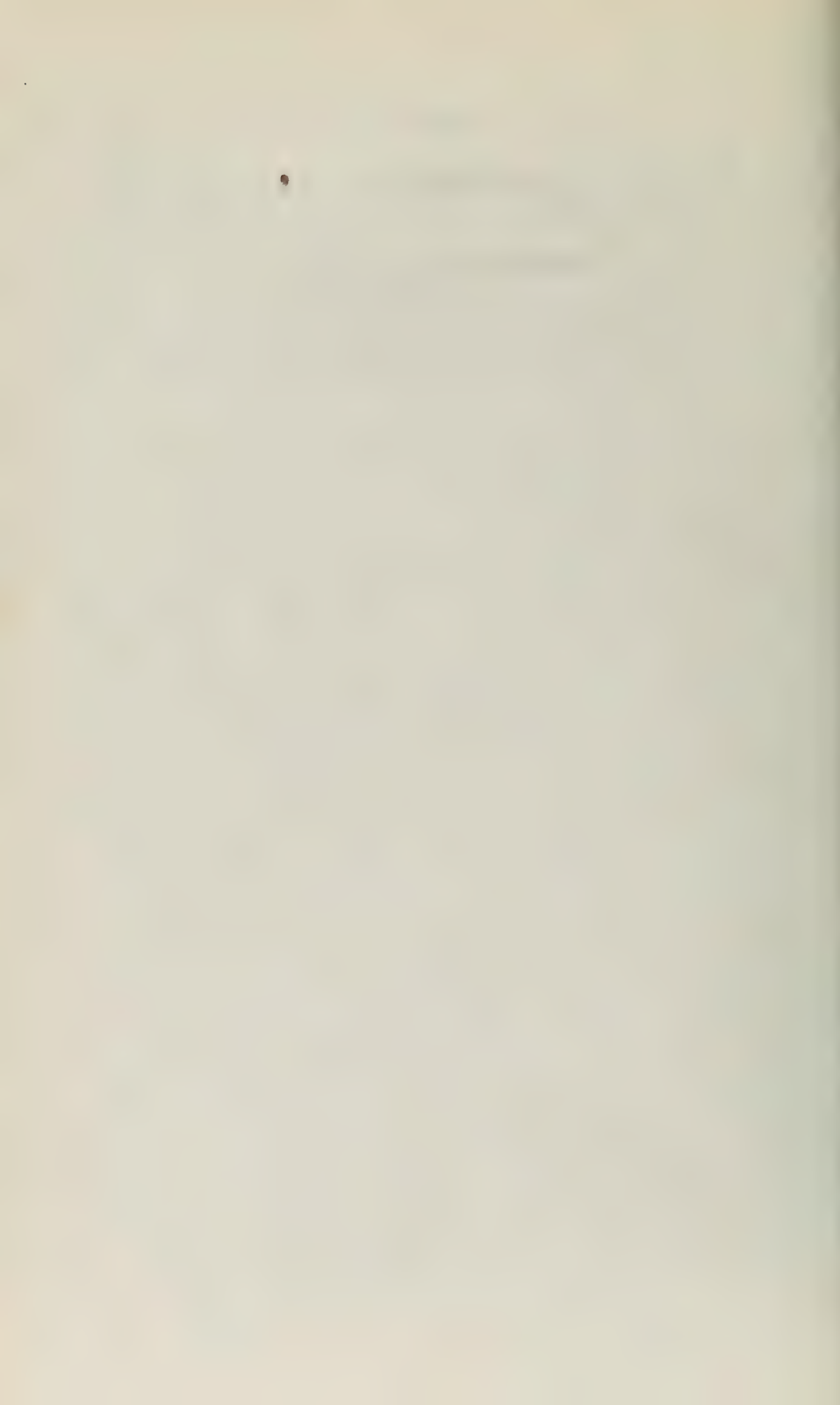
Yuma County Water Users' Association v. Schlecht, 275 Fed. 885.

and in the case of *New York Canal Co. v. Bond*, where the Court said:

"Reference to the offer contained in the public notice of the Secretary of the Interior is not required, in view of the fact that the parties agreed upon a rate of 40 cents per acre-foot as the maintenance rate in 1918 for all water delivered after July 1st. *Had they not agreed to that rate, it would have been the duty of the Secretary of the Interior in his judgment to fix a rate to be charged to the shareholders of the company.* Inded, under Section 8 of the contract of 1906, as well as Section 16 of the contract of July 1, 1918, the parties agreed that the Secretary of the Interior should determine the charges to be made, and it is reasonable to say that under the Reclamation Extension Act of August 13, 1914, authority is placed in the Secretary of the Interior to fix charges where the parties have not agreed upon them. *Kihlberg v. United States*, 97 U. S. 398, 24 L. Ed. 1106; *Houston v. St. Louis Independent Packing Co.*, 249 U. S. 479, 39 Sup. Ct. 332, 63. L. Ed. 717."

New York Canal Co. v. Bond, 265 Fed.
228.

Respectfully submitted,
E. G. DAVIS,
B. E. STOUTEMYER,
Solicitors for Appellee, J. B. Bond.



United States
Circuit Court of Appeals
For the Ninth Circuit.

NEW JERSEY INSURANCE COMPANY, a
Corporation,

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the District of Montana.

United States
Circuit Court of Appeals
For the Ninth Circuit.

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Corporation,
Plaintiff in Error,
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of the District of Montana.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States in and
for the District of Montana.

No. 1053.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Cor-
poration,

Defendant.

BE IT REMEMBERED, that on April 24, 1922, a
transcript on removal of said cause from the Dis-
trict Court of the 18th Judicial District of the
State of Montana in and for the County of Hill,

*Page-number appearing at foot of page of original certified Tran-
script of Record.

was filed in the United States District Court for the District of Montana, the complaint in said action being in the words and figures following, to wit: [2]

In the District Court of the Eighteenth Judicial District of the State of Montana, in and for the County of Hill.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Defendant.

Complaint.

The plaintiff complains and alleges:

1. That the defendant New Jersey Insurance Company is now, and at all of the times herein mentioned was, a corporation organized and existing under the laws of the State of New Jersey, and doing business in the State of Montana.

2. That on the 3d day of July, 1921, at the City of Helena, and State of Montana, in consideration of the payment by plaintiff to defendant of the premium of ninety-four and seventy-five one hundredths (\$94.75) dollars, defendant made and delivered to plaintiff its policy of insurance in writing upon the body, machinery and equipment of that certain Marmon automobile, type B 4-passenger, factory No. 4220048, motor No. 6983, more fully described in the said policy of insurance, a

copy of which is annexed to this complaint, marked Exhibit "A," and by this reference made a part hereof; and thereby insured the plaintiff in the sum of four thousand four hundred seventy-five (\$4475.00) dollars against damage to the said automobile or equipment, in excess of one hundred dollars, by being in accidental collision during the period insured with any other automobile, vehicle or object, as well as against loss by fire, *lighting*, transportation, theft, robbery and pilferage for the term of one year from and after the 3d day of July, 1921. [3]

3. That on the 18th day of July, 1921, while said insurance policy was in full force and effect, and the automobile therein described was being operated by plaintiff upon the public highway in Hill County, Montana, the said automobile was completely wrecked, damaged and destroyed by the front axle of said automobile coming and being in accidental collision with the surface of the road upon which the plaintiff was at said time driving, whereby said automobile was overturned and wrecked, and its value thereby impaired and destroyed.

4. That the intrinsic value and the cash value of the said automobile at the time of the said accident above described, and just prior thereto, was four thousand four hundred dollars; and that the loss and damage to the said automobile caused by the said accidental collision above described was four thousand dollars; and that the said loss and damage to the said automobile was not due

to puncture, cut, gash, blowout, or other ordinary tire trouble, but was wholly due to the accidental collision above described; and that the said automobile was not at the time of said collision being operated in any race or speed contest, and was not being operated by any person under the age of sixteen years, or under the age limit fixed by law.

5. That plaintiff ascertained and estimated the loss and damage to the said automobile to amount to the sum of four thousand four hundred dollars, but that defendant did not agree thereto and refused to agree thereto; and the plaintiff and the defendant, being unable to agree upon the amount of the said loss and damage, did on or about the 7th day of January, 1922, agree in writing to submit the question of the said loss and damage to appraisers, and that the said appraisers should appraise, ascertain and determine the sound value and the loss upon the property damaged or destroyed by the said collision, and did further agree that the said appraisers [4] should first select a competent and disinterested umpire who should act with them in matters of difference only, and that the award of any two of them made in writing should be binding upon the plaintiff and defendant herein as to the amount of such loss. And the plaintiff did in said writing select one appraiser named therein, and the defendant did in said writing select one appraiser named therein, and the two appraisers so chosen did, on or about the 15th day of January, 1922, select a competent and disinterested umpire; and thereafter the said ap-

praisers together did estimate and appraise the loss and damage to the said automobile, stating separately sound value and damage; and, failing to agree, did submit their differences to the said umpire; and thereafter, on or about the 16th day of January, 1922, the said umpire and one of the said appraisers did determine the amount of the said loss and damage to the said automobile, and did make, execute and deliver the award in writing of the amount of such loss and damage, wherein and whereby the said appraiser and umpire did fix and determine the sound value of the said automobile to be the sum of four thousand four hundred dollars, and the loss and damage thereto to be the sum of four thousand dollars; which said award so made, executed and delivered by the said appraisers was delivered and submitted to the defendant corporation at Butte, Montana, on or about the 18th day of January, 1922.

6. That the defendant has not paid the said sum of four thousand dollars, nor any part thereof, and that more than sixty days has elapsed after the notice, ascertainment, estimate and satisfactory proof of the loss required by the said policy has been received by the defendant corporation, including the award by the appraisers above referred to.

7. That on the 26th day of January, 1922, defendant, by notice in writing to the plaintiff, refused to pay the said loss by damage, and notified the plaintiff that the said award would be disregarded [5] by it, and would be treated as

void and not binding upon it in any manner or at all.

8. That plaintiff has kept and performed all of the terms and conditions of the said policy by him to be kept and performed.

9. That there is now due and owing from the defendant to the plaintiff the sum of four thousand dollars with interest thereon at the rate of eight per cent per annum from and after the 26th day of January, 1922.

WHEREFORE, plaintiff prays judgment against the defendant for the sum of four thousand (\$4,000.00) dollars, with interest thereon at the rate of eight per cent per annum from the 26th day of January, 1922, to date of judgment, together with his costs in this action necessarily expended.

NOLAN & DONOVAN,

J. P. DONNELLY,

Attorneys for Plaintiff.

State of Montana,
County of Hill,—ss.

C. W. Young, being first duly sworn, on oath deposes and says: That he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

C. W. YOUNG.

Subscribed and sworn to before me this 27th day of March, 1922.

[Seal]

J. P. DONNELLY,

Notary Public for the State of Montana, Residing at Havre, Montana.

My commission expires Mar. 8, 1925. [6]

Exhibit "A."

Non-Valued Fire, Theft and Transportation Form.
Automobile Policy.

No. A 370712.

NEW JERSEY INSURANCE COMPANY,

Newark, New Jersey.

Pacific & Western Canadian Department, San Francisco, Seeley & Co., Managers.

IN CONSIDERATION of the Warranties and the Premium hereinafter mentioned.

DOES INSURE

The Assured named and described herein upon the body, machinery and equipment of the automobile described herein while within the limits of the United States (exclusive of Alaska, the Hawaiian Islands and Porto Rico) and Canada, including while in building, on road, on railroad car or other conveyance, ferry or inland steamer, or coastwise steamer between ports within said limits, for the term herein specified and to an amount not exceeding the amount of insurance herein specified, against direct loss or damage caused while this policy is in force, by the perils specifically insured against.

Amount—\$4475.00. Rate—1.00. Premium—\$44.75.

Names of Assured—C. W. Young.

Address of Assured—No. — Street. City—
Havre. State—Mont.

The term of this policy begins at noon on the 3d day of July, 1921, and ends at noon on the 3d day of July, 1922, Standard time. Amount of insurance Forty-four hundred seventy-five dollars (\$4475.00). [7]

Automobile Department.

\$100 Deductible Clause.

COLLISION CLAUSE.

(Covering Damage Sustained in Excess of \$100.)
(Deductible.)

In consideration of an additional premium of \$50.00 this policy also covers subject to its other conditions, damage to the automobile and/or equipment herein described in excess of \$100 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object, excluding (1) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble; and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile, (2) loss or damage while the automobile insured is being operated in any race or speed contest or while being operated by any per-

son under the age of sixteen years or under the age limit fixed by law.

b. In the event of loss or damage to said automobile whether such loss or damage is covered by the policy or not, the liability of this company for loss or damage resulting from collision in accordance with the terms of this endorsement shall be reduced by the amount of such loss or damage until repairs have been completed but shall then attach for the full amount as originally written without additional premium.

It is hereby understood and agreed that loss under this collision clause is limited to the intrinsic value of the machine at time of accident, if any.

All other terms and conditions of this policy remaining unchanged.

Attached to and forming part of Policy No. 370712 of the New [8] Jersey Insurance Company.

Dated July 3d, 1921.

Agency at Helena, Mont.

R. L. DIGGS,

Agent.

By E. F. CAMERON.

SEELEY & CO.

General Agents and Managers, Seattle, San Francisco, Portland, Vancouver, B. C.

The following are statements of fact known to and warranted by the Assured to be true, and this policy is issued by the Company relying upon the truth thereof:

1: Assured's occupation or business is—Retired.

2: The following is the description of the automobile:

Model Year	Trade Name	Type of Body (If truck, state tonnage)	Factory Number	Motor Number
1921	Marmon	Type B 4-pass	4220048	6983
List	Motive	Number	Advertised	
Price	Power	Cylinders	Horse Power	
3985	Gas	6	34	

3: The facts with respect to the purchase of the automobile are as follows:

Mo.	Year	Purchased by the Assured New or Second Hand	Actual cost to Assured including equipment
7	1921	New	4475.00
The Automobile described is fully paid for by the Assured and is not Mortgaged or otherwise Encumbered, except as follows:			
Fully paid for			

4: The uses to which the automobile described are and will be put, are—Business and pleasure.

5: The automobile described is usually kept in private garage, located
(State whether private or public)

No. — Street — City Havre State Mont.

Countersigned at Helena, Mont., this 3d day of July, 1921.

R. L. DIGGS, Agent.

By E. F. CAMERON. [9]

PERILS INSURED AGAINST.

(Except as hereinafter provided.)

(A) Fire arising from any cause whatsoever and lightning.

(B) While being transported in any conveyance

by land or water—*strading*, sinking, collision, burning or derailment of such conveyance, including general average and salvage charges for which the Assured is legally liable.

(C) Theft, robbery or pilferage, excepting by any person or persons in the Assured's household or in the Assured's service or employment whether the theft, robbery or pilferage occur during the hours of such service or employment or not, and excepting also the wrongful conversion or secretion by a mortgagor or vendee in possession under mortgage, conditional sale or lease agreement, and excepting in any case other than in case of total loss of the automobile described herein, the theft, robbery or pilferage of tools and repair equipment.

EXCLUSIONS.

1: It is a condition of this policy that this Company shall not be liable for:

(a) Loss or damage to robes, wearing apparel, personal effects or extra bodies;

(b) Loss or damage which may be caused directly or indirectly by invasion, insurrection, riot, civil war or commotion, or military or usurped power;

2: It is a condition of this policy that it shall be null and void:

(a) If the automobile described herein shall be used, for carrying passengers for compensation, or rented, or leased, or operated in any race or speed contest during the term of this policy;

(b) If at the time a loss occurs there be any other insurance covering against the risks assumed

by this policy which would attach if this insurance had not been effected; [10]

(c) If the interest of the Assured in the property be other than unconditional and sole ownership, or if the subject of this insurance be or become encumbered by any lien or mortgage except as stated in Warranty No. 3 or otherwise endorsed hereon;

(d) If this policy or any part thereof shall be assigned without the consent of this Company endorsed hereon or in case of transfer or termination of any interest of the Assured other than by the death of an Assured, or any change in the nature of the insurable interest of the Assured in the property described herein, either by sale or otherwise.

SPECIAL PROVISIONS.

This Company shall not be liable beyond the actual cash value of the property at the time any loss or damage occurs, and the loss or damage shall be ascertained or estimated according to such actual cash value, with proper deduction for depreciation however caused, and shall in no event exceed what it would then cost the Assured to repair or replace the same with material of like kind and quality; such ascertainment or estimate shall be made by the Assured and this Company, or, if they differ, then by Appraisers as herein provided. It shall be optional with this Company to take all or any part of the property at such ascertained or appraised value and also to repair, rebuild or replace the property lost or damaged with out of like kind and quality

within a reasonable time, on giving notice within thirty days after the receipt of sworn statement of loss herein required of its intention so to do; but there can be no abandonment to the Company of the property described.

CONDITIONS.

Notice and
Proof of
Loss

In the event of loss or damage the assured shall forthwith give notice thereof in writing to this Company or the authorized agent who issued this policy, [11] and shall protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this Company shall render a statement to this Company, signed and sworn to by the said Assured, stating the knowledge and belief of the Assured as to the time and cause of the loss or damage, the interest of the Assured and of all others in the property; and the Assured as often as required, shall exhibit to any person designated by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this Company, and subscribe the same; and, as often as required, shall produce for examination all books of account, bills, invoices, and other vouchers, or certified copies thereof if originals be lost, at such reasonable place as may be designated by this Company or its representative, and shall permit extracts and copies thereof to be made.

It is a condition of this policy that failure on the part of the Assured to render such sworn state-

ment of loss to the Company within sixty days of the date of loss (unless such time is extended in writing by the Company) shall render such claim null and void.

Appraisal

In the event of disagreement as to the amount of loss or damage the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The Assured and this Company shall each select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter the appraisers together shall estimate and appraise the loss or damage, stating separately sound value and damage, and failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser respectively selected by them and shall bear equally the expenses of the appraisal and umpire.

**Payment of
Loss**

This Company shall not be held to have waived any provision on condition of this policy or any forfeiture thereof by any requirement, act or proceeding on its part relating to the appraisal [12] or to any examination herein provided for; and the sum for which this Company is liable, pursuant to this policy, shall be payable sixty days after the notice, ascertainment, estimate and satisfactory proof of the loss herein required, have been received by this Company, including an award by appraisers when appraisal is required hereunder.

Protection of Salvage Any act of the Assured or this Company, or its agents, in recovering, saving and preserving the property described herein in case of loss or damage, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and all reasonable expenses thus incurred shall constitute a claim under this policy.

Subrogation If this Company shall claim that the loss or damage was caused by the act or neglect of any person or corporation, private or municipal, this Company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the Assured for the loss resulting therefrom, and such right shall be assigned to this Company by the Assured on receiving such payment.

It is a condition of this policy that this insurance shall not inure to the benefit of any carrier whatsoever but the right of the Assured to recover under this policy shall not be prejudiced by any release from liability which may have been given to any railroad or other carrier or bailee in any bill of lading or other contract of carriage or storage, and this Company conceded to the Assured the right to give such release; any right of recovery the Assured is entitled to against said carrier or others shall, by subrogation, inure to the benefit of this Company upon payment of the claim and this Company shall be entitled, if it so desire, to take over and conduct in the name of the Assured, the defense of any action or to prosecute any claim for in-

demnity, damages or otherwise against any third party.

Cancellation

This policy shall be cancelled at any time at the request of the Assured; or by the Company by giving five days' notice of such cancellation. If this policy shall be cancelled as hereinbefore [13] provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy, this Company retaining the customary short rate; except that when this policy is cancelled by this Company by giving notice it shall retain only the *pro rata* premium. Notice of cancellation mailed to the address of the Assured stated in the policy shall be a sufficient notice; the check of the Company, or its agent, when similarly mailed shall be a sufficient tender of any unearned premium.

Misrepresentation and Fraud

This entire policy shall be void if the Assured or his agent has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance or the subject thereof; or if the Assured or his agent shall make any attempt to defraud this Company either before or after the loss.

Agent

No person shall be deemed an agent of this Company unless specifically authorized in writing by the Company.

Suit Against Company

No suit or action on this policy, for the recovery of any claim shall be sustainable in any court of law or equity unless the Assured shall have fully complied with all the fore-

going requirements, nor unless commenced within twelve months next after the happening of the loss, provided that where such limitation of time is prohibited by the laws of the State wherein this policy is issued, then and in that event no suit or action under this policy shall be sustainable, unless commenced within the shortest limitation permitted under the laws of such state.

THIS POLICY IS MADE AND ACCEPTED SUBJECT TO THE PROVISIONS, EXCLUSIONS, CONDITIONS AND WARRANTIES SET FORTH HEREIN OR ENDORSED HEREON together with such other provisions, exclusions, conditions or warranties as may be endorsed hereon or added hereto, and upon acceptance of this policy the Assured agrees that its terms embody all agreements then existing between himself and the Company or any of its agents relating to the insurance described herein, and no officer, agent or other representative [14] of this Company shall have power to waive any of the terms of this policy unless such waiver be written upon or attached hereto, nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the Assured unless so written or attached.

PROVISIONS REQUIRED BY LAW TO BE STATED IN THIS POLICY. This policy is in a stock corporation.

IN WITNESS WHEREOF, this Company has executed and attested these presents; but this policy

shall not be valid unless countersigned by a duly authorized Agent of the Company.

J. B. CUTERIE,

Secretary.

J. STEWART,

President.

TRANSFER (For Assured ONLY AFTER
to sign)

CONSENT OF COMPANY HAS BEEN OBTAINED.

The ownership of the property herein insured having actually passed to _____ for value received, — hereby transfer, and assign, unto — all — title and interest in this policy, subject to all the terms and conditions herein mentioned and referred to.

Occupation of new owner? —. Address —.

New location of car? —. Public or private garage? —.

Date when purchased? —. Cost to new owner, including its equipment, was \$—.

Is this automobile mortgaged or in any way encumbered? —.

Is automobile fully paid for? —.

If bought on installments state amount due and terms for payment \$—. The automobile is to be used ONLY for — purposes.

Will this automobile be used to carry passengers for compensation? —.

Dated —, 19—.

_____ ,

Assured.

Witness: _____. [15]

CONSENT (For Agent ONLY AFTER CON-
to sign)

SENT OF COMPANY HAS BEEN OB-
TAINED.

The ownership of the property herein insured
having actually passed to _____
THE NEW JERSEY INSURANCE COMPANY
relying upon the truth of the foregoing statement
of facts, hereby consents that the interest of ____
in the within Policy, subject to all terms and con-
ditions herein mentioned and referred to, and subject
to the payment of any premium due, or to become
due hereon, be assigned to ____.

D _____, 19____.

_____ ,

Agent.

If this policy is cancelled the following receipt
is to be filled up and signed by the insured.

_____, 19____.

IN CONSIDERATION of ____ Dollars, Return
Premium, the Receipt of which is hereby acknowl-
edged, this Policy is cancelled and surrendered to
the NEW JERSEY INSURANCE COMPANY.

_____ ,

Assured.

(Endorsed on back:)

Form No. 2.

AUTOMOBILE POLICY.(Non-valued Fire, Theft and Transportation
Form.)

Expires—July 3d, 1922.

Property—C. W. Young.

Amount—\$4475.00.

Premium—\$94.75.

No. A370712.

NEW JERSEY INSURANCE COMPANY.

Newark, New Jersey.

Capital \$1,000,000.

SEELEY & CO.Managers, Pacific Coast Department,
Coleman Building.

Seattle,

Wash.

R. L. DIGGS,

Agent.

Fire	24.61
Theft	20.14
Collision \$100 ded.	50.00

 94.75

Complaint filed Mar. 28, 1922. Geo. W. Glass,
Clerk. [16]

Thereafter on June 26, 1922, the defendant's answer was duly filed herein, which is in the words and figures following, to wit: [17]

In the United States District Court for the District
of Montana, Butte Division.

No. 350.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Cor-
poration,

Defendant.

Answer.

Now comes the above-named defendant and for
its answer to the complaint of the plaintiff on file
herein admits, denies and alleges as follows, to wit:

I.

Admits the allegations contained in paragraph 1
of said complaint.

II.

Admits the allegations of paragraph 2 of said
complaint.

III.

Denies the allegations of parargaph 3 of said
complaint.

IV.

As to the allegations of paragraph 4 that the in-
trinsic value and the cash value of said automobile
at the time of the alleged accident, or just prior
thereto, was four thousand four hundred (\$4,400.00)
dollars, this defendant denies any knowledge or in-
formation sufficient to form a belief.

Denies that the loss or damage to said automobile caused by any accidental collision whatever, in any manner whatever, was four thousand (\$4,000.00) dollars or any other or greater sum than fifteen hundred (\$1500.00) dollars.

Admits that the said alleged loss and damage to said automobile was not due to puncture, cut, gash, blowout or other ordinary tire trouble, and denies that said loss or damage to said automobile was wholly due or due at all to accidental collision as described in said complaint, or otherwise, in any manner whatever, or at all. [18]

As to the allegations that said automobile was not at the time of said collision or any collision being operated in any race or speed contest and was not being operated by any person under the age of sixteen (16) years or under the age limit fixed by law, this defendant denies any knowledge or information sufficient to form a belief.

V.

As to the allegations of paragraph 5, this defendant admits that there was a disagreement between the plaintiff and defendant as to the amount of loss or damage to the automobile in question, and that there was an agreement to submit the question of said loss and damage to appraisers.

Denies each and every other allegation contained in paragraph 5 except as the same is herein specifically admitted, denied or explained, and in this connection this defendant avers the facts to be:

That on or about the 7th day of January, 1922, the said plaintiff and defendant entered into an

agreement or submission to appraisers, and the plaintiff named as appraiser, Dan W. McNicol, and the defendant named as appraiser, Malcolm McLeod: that the said appraisers made their declaration under oath, selected George B. Bourne as umpire, the said George B. Bourne, as umpire, qualified under oath and thereafter, on the 16th day of January, 1922, George B. Bourne and Dan W. McNicol made an award in writing, a copy of which said agreement to submission to appraisers, together with the declaration of the appraisers, selection of umpire, qualification of umpire and award is hereto attached and hereof made a part, marked Exhibit 1.

That the said Dan McNicol named as one of the appraisers in said agreement for submission to appraisers, and the said George B. Bourne, named as umpire, were neither of them competent or disinterested at the time of their selection, and the said pretended award signed by said George B. Bourne and Dan W. McNicol was void in that it did not conform to the terms of the policy in this: that it did not show that the said appraisers, to wit: Dan W. McNicol and Malcolm McLeod together ascertained or appraised the amount of loss or damage, nor that they stated separately the sound value and damage and failed to agree, and that thereafter they submitted their differences to the umpire.

That as a fact, the said appraisers Dan W. McNicol and Malcolm McLeod on or about the 15th day of January, 1922, met at Havre, Montana and proceeded [19] to examine the car and determine what was necessary to be supplied, and the cost

thereof, and the total amount of damage to the said car; that the said appraisers itemized each part to be supplied and the cost thereof, and agreed as to the amount of damage and the need of new parts specifically, with one exception, and that was as to the necessity of a new frame; that a difference of opinion arose as to the necessity of a new frame and this was submitted to George B. Bourne, the umpire named, as aforesaid; that said George B. Bourne, umpire as aforesaid, decided that a new frame was necessary, and it was agreed that the cost thereof was two hundred and fifty (\$250.00) dollars and the hours required to put the same on was fifty (50) hours. It was further agreed that a new body was necessary, but the cost thereof could not be estimated until word was received from the factory relative thereto.

That while inquiry was being made over the telephone by Malcolm McLeod, one of the appraisers, to ascertain the cost of the new body, one J. P. Donnelly, attorney for C. W. Young, plaintiff, talked with Dan W. McNicol, the appraiser and thereupon the said Dan W. McNicol refused to consider any other estimate of the value of the car and the damage thereto than the sum of Three thousand seven hundred (\$3700.00) dollars, allowing only three hundred (\$300.00) dollars as the value of the wrecked car and the salvage thereon.

That thereupon, the meeting of the appraisers was adjourned and no further steps were taken by the appraisers under the said submission as above set forth.

That on or about the 16th day of January, 1922, the said Malcolm McLeod left Havre and no further hearings were had, nor did said appraisers again meet; that the said umpire, George B. Bourne, was not called in in any manner after any other disagreement of the appraisers as above set forth to act with them in the matter of any differences whatever, save and except the difference as to the necessity of a new frame as above set forth; that the said umpire never had, in any manner, whatever, submitted to him any other matters of difference save and except the question of the necessity of the new frame which was determined by him as above set forth.

That the said George B. Bourne, as umpire under the agreement for submission to appraisers had authority to act with said appraisers in matters of difference [20] only; that it was necessary for the said umpire, in order to determine any matter of difference, to hear the evidence submitted by both sides and to estimate what, if any, difference existed between the said appraisers and to determine such difference only after said submission to him; that said appraiser, Malcolm McLeod, had no information of any difference existing between himself and the appraiser, Dan McNicol except as above set forth; that said Dan McNicol did not, in any way, offer to submit any difference as to the value of the car or the damage thereto, or the loss or damage occasioned by said alleged accident, to the said George B. Bourne, the umpire, and the said Dan McNicol withdrew from the appraisalment and

repudiated the value and amount of damage arrived at by himself and appraiser Malcolm McLeod after his conversation with J. P. Donnelly, attorney for the plaintiff; that the said umpire, George B. Bourne, did not participate in said appraisal, knew nothing of the facts connected with the loss and damage to the car, did not arrive at any result after calm, careful and judicial consideration of facts submitted to him by the appraisers, but in the absence of the appraiser, Malcolm McLeod, and after the meeting had been adjourned, and without any hearing or information whatever, the said George B. Bourne, as umpire, and the said Dan W. McNicol, one of the appraisers, signed the award as set forth in said Exhibit 1 and not otherwise.

VI.

As to the allegations contained in paragraph 6 of said complaint, this defendant admits that it has not paid the sum of four thousand (\$4,000.00) dollars nor any part thereof. Denies each and every other allegation of said paragraph 6.

VII.

As to the allegations of paragraph 7, admits that on or about the 26th day of January, 1922, the defendant served upon the plaintiff notice in writing, a copy of which is hereto attached marked Exhibit 2 and hereof made a part. Denies each and every other allegation of said paragraph 7 of said complaint not hereinbefore specifically admitted.

VIII.

Denies the allegations of paragraph 8 of said complaint. [21]

IX.

Denies the allegations of paragraph 9 of said complaint.

FOR FURTHER ANSWER AND FIRST AFFIRMATIVE DEFENSE to the complaint of the plaintiff on file herein, this defendant avers the fact to be:

I.

That by the terms of the policy of insurance, a copy of which is attached to plaintiff's complaint and marked Exhibit "A," it was specified among other things:

"In consideration of an additional premium of \$50.00 this policy also covers subject to its other conditions, damage to the automobile and/or equipment herein described in excess of \$100 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object."

II.

That on or about the 18th day of July, 1921, at the time mentioned and specified in the complaint of the plaintiff on file herein, the said automobile of said plaintiff, while being operated by plaintiff upon the public highway in Hill County, Montana, was wrecked and damaged in the manner following, to wit, and not otherwise: The front axle of said automobile for some reason unknown to the defend-

ant, broke and by reason thereof, the said automobile was overturned, and the injury and damage to the same occasioned, and produced, by reason of the said breaking of said axle and the overturning of said automobile; that the said automobile did not come into accidental collision or otherwise with the surface of the road upon which the same was at said time being driven until by reason of breaking of said front axle said car was overturned and wrecked. That the breaking of said axle was the direct and proximate cause of damage and injury to said car; that there was no collision with any other automobile, vehicle or object, and that the loss and damage to the said automobile was caused by reason of the said breaking of the said front axle of same and not otherwise.

III.

That the fact that said front axle of said automobile broke and caused said automobile to be overturned and wrecked was not within the terms of the [22] policy of insurance above quoted and was not an accidental collision within the terms and meaning of the risks insured against in said policy and that by reason thereof the said plaintiff has no grounds for the relief sought to be recovered in this action against said defendant.

FOR A FURTHER AND SECOND AFFIRMATIVE DEFENSE to the complaint of the plaintiff on file herein, this defendant avers:

I.

That the policy of insurance attached to plain-

tiff's complaint and marked Exhibit "A" contains the following clause:

"It is a condition of this policy that it shall be null and void:

* * * * *

(b) If at the time a loss occurs there be any other insurance covering against the risks assumed by this policy which would attach if this insurance had not been effected; * * * "

II.

That the said plaintiff on the 13th day of June, 1921, made and executed an order upon the T. C. Power Motor Car Company, a corporation organized and existing under the laws of the state of Montana, and located at Helena, Montana, for the purchase of the automobile described in the plaintiff's complaint herein. That pursuant to said order blank, the said automobile therein described, being the automobile mentioned and described in plaintiff's complaint, was delivered to said plaintiff on or about the 1st day of July, 1921; that accompanying said order blank, and as a part thereof, there was a specific warranty, which said warranty was in words and figures following, to wit:

"We warrant each new motor vehicle manufactured by us, whether passenger car or commercial vehicle, to be free from defects in material and workmanship under normal use and service, our obligation under this warranty being limited to making good at our factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the

original purchaser, be returned to us with transportation charges prepaid, and which our examination shall disclose to our satisfaction to have been thus defective, this warranty being expressly in lieu of all other warranties expressed or implied and of all other obligations or liabilities on our part, and we neither assume nor authorize any other person to assume for us any other liability in connection with the sale of our vehicles.”

That by the terms of said warranty the said plaintiff was insured against [23] loss or damage to the car by reason of defects in material and workmanship, and that said warranty constituted an insurance against risks assumed in said policy of insurance and which would attach if said insurance had not been effected, and that by reason whereof, in accordance with the terms and conditions of said policy above set forth, said policy was null and void.

FOR A FURTHER AND THIRD AFFIRMATIVE DEFENSE, this answering defendant avers:

I.

That the policy of insurance attached to plaintiff's complaint marked Exhibit “A” contains the following:

“It is a condition of this policy that it shall be null and void:

* * * * *

(b) If at the time a loss occurs there be any other insurance covering against the risks assumed by this policy which would attach if this insurance had not been effected”;

II.

That at the time of the purchase of said car on or about the 1st day of July, 1921, and at the time of the accident, there was a latent defect in the front axle of said automobile described in plaintiff's complaint, and which said defect caused the front axle of said automobile to break, the said car to overturn and the damage and wrecking of said car was occasioned and brought about by reason of said latent defect in said front axle.

III.

That the Marmon Motor Company, the manufacturer of said automobile by reason of the defect in the said front axle of said automobile became and was liable to the purchaser of said automobile, to wit: plaintiff, for damage occasioned to said car by reason of the damage to the said car occasioned by the said defect in said front axle thereof; that the said Marmon Motor Company had secured from United States Fidelity & Guaranty Company, a policy of insurance to protect and save harmless the said Marmon Motor Company from all loss and liability occasioned through defect in the parts of said automobile; the exact terms of which said policy of insurance are to the defendant unknown; [24] that said policy of insurance covered against the risks assumed by the policy of insurance attached to plaintiff's complaint marked Exhibit "A," and was in full force and effect on the 18th day of July, 1921, when the loss, if any, occurred. That by reason of said insurance as above set forth covering

against the risks assumed by this policy, this policy became null and void.

FOR A FURTHER AND FOURTH AFFIRMATIVE DEFENSE, this defendant avers:

I.

That the policy of insurance attached to plaintiff's complaint on file herein, marked Exhibit "A" contains the following condition:

"In the event of loss or damage the assured shall forthwith give notice thereof in writing to this Company or the authorized agent who issued this policy, and shall protect the property from further loss or damage; and within sixty days thereafter, unless such time is extended in writing by this Company shall render a statement to this Company, signed and sworn to by the Assured, stating the knowledge and belief of the Assured as to the time and cause of the loss or damage, the interest of the Assured and of all others in the property; * * *"

Also:

"It is a condition of this policy that failure on the part of the Assured to render such sworn statement of loss to the Company within sixty days of the date of loss (unless such time is extended in writing by the Company) shall render such claim null and void."

II.

That the said plaintiff did not immediately after the loss or damage to plaintiff's automobile, on or about the 8th day of July, 1921, give notice thereof

in writing to the defendant Company or the authorized agent who issued said policy, nor did said plaintiff render a statement to said Company signed and sworn to by said plaintiff stating knowledge and belief of plaintiff as to the time and cause of the loss, or damage, the interest of the assured and of all others in the property; nor did the plaintiff render any such sworn statement of loss to the Company within sixty days after the 8th day of July, 1921, or at any other time, and that by reason of failure of said plaintiff so to do the said claim of plaintiff became null and void. [25]

FOR A FURTHER AND FIFTH AFFIRMATIVE DEFENSE, this defendant avers:

I.

That the policy of insurance attached to plaintiff's complaint contains the following provision:

“In the event of disagreement as to the amount of loss or damage the same must be determined by competent and disinterested appraisers before recovery can be had hereunder. The assured and this Company shall each select one, and the two so chosen shall then select a competent and disinterested umpire. Thereafter the appraisers together shall estimate and appraise the loss or damage, stating separately sound value and damage, and failing to agree, shall submit their difference to the umpire; and the award in writing of any two shall determine the amount of such loss or damage; the parties thereto shall pay the appraiser

respectively selected by them and shall bear equally the expenses of the appraisal and umpire.”

II.

That there was a disagreement between the plaintiff and defendant as to the amount of loss or damage and thereupon appraisers were named as set forth in Exhibit 1 hereto attached and hereof made a part; that the said appraisers duly qualified and entered upon the discharge of their duties, selected one George B. Bourne as umpire as set forth in said Exhibit 1 hereto attached and hereof made a part, and later an award was signed by the said George B. Bourne and one Dan W. McNicol, appraiser selected by plaintiff, as set forth in said Exhibit 1 hereto attached and hereof made a part. That upon receipt of said award as above set forth the said defendant served upon the plaintiff its notice and refusal to recognize the award, which said notice is in words and figures as set forth in Exhibit 2 hereto attached and hereof made a part.

III.

That the said Dan W. McNicol named as one of the appraisers in said agreement for submission to appraisers, and the said George B. Bourne, named as umpire were neither of them, competent or disinterested at the time of their selection, and the said pretended award signed by said George B. Bourne and Dan W. McNicol was void in that it did not conform to the terms of the policy in this: that it did not show that the said appraisers, to wit: Dan McNicol and Malcolm McLeod together ascer-

tained or appraised the amount of loss or damage, nor that thereafter they submitted their difference to the umpire. [26]

That as a fact, the said appraisers Dan W. McNicol and Malcolm McLeod, on or about the 15th day of January, 1922, met at Havre, Montana, and proceeded to examine the car and determine what was necessary to be supplied, and the cost thereof, and the total amount of damage to the said car; that the said appraisers itemized each part to be supplied and the cost thereof, and agreed as to the amount of damage and the need of new parts specifically, with one exception, and that was as to the necessity of a new frame; that a difference of opinion arose as to the necessity of a new frame and this was submitted to George B. Bourne, the umpire named, as aforesaid; that said George B. Bourne, umpire as aforesaid, decided that a new frame was necessary, and it was agreed that the cost thereof was Two Hundred and Fifty (\$250.00) dollars and the hours required to put the same on was fifty (50) hours. It was further agreed that a new body was necessary but the cost thereof could not be estimated until word was received from the factory relative thereto.

That while inquiry was being made over the telephone by Malcolm McLeod, one of the appraisers, to ascertain the cost of the new body, one J. P. Donnelly, attorney for C. W. Young, plaintiff, talked with Dan W. McNicol, the appraiser and thereupon the said Dan W. McNicol refused to consider any other estimate of the value of the car and

the damage thereto than the sum of Three Thousand seven hundred (\$3,700.00) dollars, allowing only three hundred (\$300.00) dollars as the value of the wrecked car and the salvage thereon.

That thereupon, the meeting of the appraisers was adjourned and no further steps were taken by the appraisers under the said submission as above set forth.

That on or about the 16th day of January, 1922, the said Malcolm McLeod left Havre and no further hearings were had, nor did said appraisers again meet; that the said umpire, George B. Bourne, was not called in in any manner after any other disagreement of the appraisers as above set forth to act with them in the matter of any differences whatever, save and except the [27] difference as to the necessity of a new frame as above set forth; that the said umpire never had, in any manner, whatever, submitted to him any other matters of difference save and except the question of the necessity of the new frame which was determined by him as above set forth.

That the said George B. Bourne, as umpire under the agreement for submission to appraisers had authority to act with said appraisers in matters of difference only; that it was necessary for the said umpire, in order to determine any matter of difference, to hear the evidence submitted by both sides and to estimate what, if any, difference existed between the said appraisers and to determine such difference only after said submission to him; that said appraiser, Malcolm McLeod, had no infor-

mation of any difference existing between himself and the appraiser, Dan McNicol, except as above set forth; that said Dan McNicol did not, in any way, offer to submit any difference as to the value of the car or the damage thereto, or the loss or damage occasioned by said alleged accident, to the said George B. Bourne, Umpire as aforesaid, and the said Dan McNicol withdrew from the appraisement and repudiated the value and amount of damage arrived at by himself and appraiser Malcolm McLeod after his conversation with J. P. Donnelly, attorney for the plaintiff; that the said umpire, George B. Bourne, did not participate in said appraisal, knew nothing of the facts connected with the loss and damage to the car, and did not arrive at any result after calm, careful and judicial consideration of facts submitted to him by the appraisers, but in the absence of the appraiser, Malcolm McLeod, and after the meeting had been adjourned, and without any hearing or information whatever, the said George B. Bourne, as umpire, and the said Dan W. McNicol, one of the appraisers, signed the award as set forth in said Exhibit 1 and not otherwise. [28]

IV.

That by reason of the foregoing fact, said award signed by said George B. Bourne and Dan McNicol was null and void and of no effect.

WHEREFORE, this defendant having fully answered, asks to be dismissed with its costs in this behalf expended.

GEORGE F. SHELTON,
Attorney for Defendant.

State of Montana,
Silver Bow County,—ss.

George F. Shelton, being first duly sworn, deposes and says: That he is one of the attorneys for the defendant in the above-entitled action, and makes this affidavit on behalf of said defendant for the reason that there is no officer of said defendant Company in the county wherein affiant resides, to wit: Silver Bow County, Montana; that he has read the foregoing answer, knows the contents thereof, and that the matters and facts therein stated are true to the best of his knowledge, information and belief.

GEORGE F. SHELTON.

Subscribed and sworn to before me this 26 day of June, 1922.

[Notarial Seal] GEORGE D. TOOL,
Notary Public for the State of Montana, residing
at Butte, Montana.

My commission expires Mar. 15, 1925. [29]

Exhibit No. 1.

PACIFIC COAST ADJUSTMENT BUREAU,
Merchants Exchange Building, San Francisco.
AGREEMENT FOR SUBMISSION TO AP-
PRAISERS.

THIS AGREEMENT, made and entered into by and between C. W. Young of the first part, and the Insurance Company or Companies, whose name

or names are signed hereto, of the second part, each for itself and not jointly.

WITNESSETH: That Dan McNicol and Malcolm McLeod shall appraise, ascertain and determine the sound value of the loss upon the property damaged and (or) destroyed by the collision of July 18, 1921, as specified below. PROVIDED, That the said APPRAISERS shall FIRST select a competent and disinterested umpire who shall act with them in matters of difference ONLY. The award of any two of them, made in writing, in accordance with this agreement shall be binding upon both parties to this agreement as to the amount of such loss.

It is expressly understood that this agreement and appraisement is for the purpose of ascertaining and fixing the amount of sound value and loss and (or) damage ONLY, to the property hereinafter described, and shall not determine, waive or invalidate any other right or rights of either party to this agreement.

The property on which the sound value and the loss (or) damage is to be determined is as follows, to wit: 1—1921 4 Passenger Marmon Automobile Factory No. 4220048, Motor No. 6983.

It is further expressly understood and agreed that in determining the sound value and the loss or damage upon the property hereinbefore mentioned, the said appraisers are to make an estimate of the actual cash cost of replacing or repairing the same, or the actual cash value thereof, at and immediately preceding the time of the fire; and

in case of depreciation of the property from use, age, condition, location or otherwise, a proper deduction shall be made therefor.

IN WITNESS WHEREOF, we have hereunto set our hands, at Havre, Mont., this 7th day of January, 1922.

C. W. YOUNG,
NEW JERSEY INSURANCE COMPANY.
By PACIFIC COAST ADJUSTMENT BUREAU.
By F. H. HENDERSON,
Adjuster. [30]

DECLARATION OF APPRAISERS.

State of Montana,
County of Hill,—ss.

We, the undersigned, do solemnly swear that we will act with strict impartiality in making an appraisal and estimate of the sound value of the loss and damage upon the property hereinbefore mentioned, in accordance with the foregoing appointment, and that we will make a true, just and conscientious award of the same according to the best of our knowledge, skill and judgment. We are NOT related to the assured, either as creditors or otherwise, and are NOT interested in said property or the insurance thereon.

M. MACLEOD,
D. W. MCNICOL,
Appraisers.

Subscribed and sworn to before me, this 15th day of Jan., 1922.

J. P. DONNELLY,
Notary Public for the State of Montana, Residing
at Havre, Montana.

My commission expires Feb. 27, 1922.

SELECTION OF UMPIRE.

We, the undersigned, hereby select and appoint Geo. Bourne to act as umpire to settle matters of difference that exist between us by reason of and in compliance with the foregoing agreement and appointment.

Witness our hands this 15th day of January, 1922.

M. MacLEOD,.

M. MacLEOD,

QUALIFICATION OF UMPIRE.

State of Montana,
County of Hill,—ss.

I, the undersigned, hereby accept the appointment of umpire, as provided in the foregoing agreement, and solemnly swear that I will act with strict impartiality in all matters of difference ONLY that shall be submitted to me in connection with this appointment, and I will make a true, just and conscientious award, according to the best of my knowledge, skill and judgment. I am NOT related to any of the parties to this agreement nor interested as a creditor or otherwise in said property or insurance.

GEORGE B. BOURNE.

Subscribed and sworn to before me, this 15th day of Jan., 192—.

J. P. DONNELLY,
Notary Public for the State of Montana, Residing
at Havre, Montana.

My commission expires Feb. 27, 1922.

To the Parties in Interest:

We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value to be Forty-four Hundred Dollars, and the loss and damage to be Forty Thousand Dollars.

Witness our hands this 16th day of January, 1922.

GEORGE B. BOURNE,
DAN W. McNICOL,

Appraisers. [31]

Exhibit No. 2.

January 26, 1922.

C. W. Young and Nolan & Donovan and J. P. Donnelly, His Attorneys, Butte, Montana.

Gentlemen:

The letter of Nolan & Donovan to New Jersey Insurance Company of date January 18, 1922, enclosing "Agreement for Submission to Appraisers" and the pretended award thereon has been received, but you are hereby notified that the said pretended award is void and not binding upon New Jersey Insurance Company, and will be disregarded by it for the reasons following:

(1) Dan McNicol named as one of the appraisers in said agreement for submission to appraisers was not competent or disinterested at the time of his selection as appraiser, which fact was not known to New Jersey Insurance Company, and was known to C. W. Young, the assured.

(2) That George B. Bourne named as umpire was not at the time competent and disinterested, which said fact was not known at the time of his selection, to New Jersey Insurance Company, and was known to C. W. Young, the assured.

(3) That the pretended award signed by George B. Bourne and Dan W. McNicol does not conform to the terms of the policy in this: That it does not show that the appraisers, to wit: Dan W. Nicol and Malcolm McLeod together estimated or appraised the loss or damage, nor that they stated separately the sound value and damage and failed to agree, and that thereafter, they submitted their difference to the umpire and in this connection, the facts are as follows:

That the appraisers named, Dan W. McNicol and Malcolm McLeod, on the 15th day of January, 1922, met at Havre and proceeded to examine the car and determine what was necessary to be supplied and the cost thereof, and the total amount of damage to the said car, and the said appraisers itemized each part to be supplied and the cost thereof, and agreed as to the amount of damage and the need of new parts specifically with one exception.

A question arose as to the necessity of a new frame, and for the purpose of determining whether a new frame was required, George B. Bourne was [32] named as umpire to make the determination and for this purpose only. That Bourne decided that a new frame was necessary, and it was agreed that the cost thereof, was \$250.00 and the hours required to put the same on was fifty hours. It was further agreed that a new body was necessary but the cost thereof could not be estimated until word was received from the factory relative thereto.

While inquiry was being made over the telephone by McLeod, one of the appraisers, relative to the cost of the new body, one J. P. Donnelly, attorney for C. W. Young, had talked with Dan McNicol, the appraiser, and thereupon, the said Dan W. McNicol refused to consider any other estimate of the value of the car and the damage thereto than the sum of \$3,700.00, allowing \$300.00 in addition thereto as the value of the wreck; that thereupon the meeting of the appraisers was adjourned and no further steps were taken by the said appraisers under the submission; that on January 16th, 1922, the said Malcolm McLeod left Havre; that no further hearings were had, in any manner after the disagreement of the appraisers to act with them in the matter of any differences whatever, save and except the difference as to the new frame as above set forth; that the said umpire never had in any manner whatever, submitted to him any other matters of difference save and ex-

cept the question of the frame which was determined as above set forth.

That said Bourne as umpire under the Agreement for Submission to Appraisers could act with said appraisers in matters of difference only. It would be necessary for said umpire, in order to determine any difference, to hear the evidence submitted by both sides and to estimate what, if any, difference existed between the appraisers and to determine at the request of said appraisers, such difference. Appraiser McLeod was not apprised of any difference of opinion except as hereinbefore set forth, and the act of appraiser D. W. McNicol in withdrawing from appraisement and in repudiating the value arrived at by himself and appraiser McLeod was done by direction of one J. P. Donnelly, an attorney of Havre, Montana, who is attorney for the assured C. W. Young, and any decision thereafter made by said McNicol was not made voluntarily, freely and judicially by said appraiser, but was a result of the coercion, influence and tactics of said J. P. Donnelly; that the signature of George B. Bourne, umpire aforesaid, was a result of the coercion and influence of said J. P. Donnelly, attorney for C. W. Young, assured, and was not the result of calm, careful and judicial consideration of facts as submitted by the appraisers, and that said Bourne did not act with strict impartiality, and in making his decision, if any there was in this case, did not act in a matter of difference which was submitted to him in connection with his position as umpire as aforesaid.

That this award, if any there was signed in this case, was not a true, just and conscientious award based on any knowledge, skill or judgment; that said Bourne was without jurisdiction to make said award or any award except as to the value of said frame of said car, and the document submitted by you signed by D. W. McNicol is void as against the New Jersey Insurance Company and will be so treated by said Company.

Very truly yours,

NEW JERSEY INSURANCE COMPANY,

By _____, [33]

Service of the foregoing answer acknowledged and copy received this 26 day of June, 1922.

J. P. DONNELLY,

NOLAN & DONOVAN,

Attorneys for Plaintiff.

Answer filed June 26th, 1922. C. R. Garlow,
Clerk. [34]

Thereafter, on September 1, 1922, plaintiff's reply was duly filed herein, which is in the words and figures following, to wit: [35]

In the United States District Court, for the District
of Montana, Butte Division.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Cor-
poration,

Defendant.

Reply.

Comes now the above-named plaintiff, and for his reply to the answer of the defendant, admits, denies and alleges, as follows, to wit:

For his reply to the matters set forth in the fifth paragraph of the defendant's first defense, plaintiff denies that George B. Bourne, or Dan W. McNickol, or either of them, was incompetent to act as an appraiser of the loss or damage done to the plaintiff's automobile, and denies that they, or either of them, were in any manner interested in such appraisement, and plaintiff alleges that the award made by the said appraisers was made upon the printed form prepared by the defendant and submitted to the said appraisers for use by them in making of such appraisement, and that the said appraisement as made by the said appraisers was made in the manner and in the form agreed to by the defendant, and upon the form of appraisement prepared by the defendant, and by it submitted to the said appraisers for their use, and that plaintiff relied upon the said form prepared by the defendant for use by the said appraisers, and agreed thereto, and by its conduct and agreements herein alleged, the defendant is estopped from objecting to the said form of appraisement for insufficiency, and has waived any and all objection thereto, which it might otherwise have.

Plaintiff admits that plaintiff named as appraiser, Dan W. McNicol and the defendant named as an appraiser Malcolm MacLeod, and that the

said appraisers made their declarations under oath, selected George G. Bourne as umpire, and that the said George B. Bourne qualified under oath, and thereafter, on the 16th day of January, 1922, George B. Bourne and Dan W. McNicol made an award in writing, a copy of which said agreement for submission to appraisers, together with the declaration of the [36] appraisers, selection of umpire, qualifications of umpire, and award attached to the defendant's answer and marked Exhibit 1, and is correct, except that the amount of the loss and damage is erroneously stated in said alleged copy to be \$40,000 dollars, whereas, the amount stated in the said award is \$4000 dollars; and that the appraisers agreed that a new frame was necessary for the said car, and that a new body was necessary for the said car.

Plaintiff denies generally each and every other allegation in said paragraph five, or defendant's first defense.

FOR REPLY TO THE FURTHER ANSWER and first affirmative defense contained in the defendant's answer, plaintiff admits the allegations contained in paragraph I, thereof.

Admits that the said automobile of plaintiff was wrecked and damaged while being operated by plaintiff upon the public highway in Hill County, Montana.

Denies generally, each and every other allegation contained in the said further answer, and first affirmative defense.

FOR REPLY TO THE FURTHER ANSWER
and fourth affirmative defense:

Plaintiff admits the allegations contained in paragraph II, of said fourth affirmative defense, plaintiff alleges:

That plaintiff received and suffered great bodily injuries at the time of, and in connection with, the damage to the said automobile, on or about the 18th day of July, 1921, and was, as a result of said injuries, confined to the Hospital and was unable to attend to business for approximately one week thereafter. That, nevertheless, the plaintiff, without unnecessary delay, caused notice of the said loss to be given in writing to the defendant, and its authorized agent, R. L. Diggs, on or about the 20th day of July, 1921, and that thereafter, at divers times between the 20th day of July, 1921, and the 16th day of September, 1921, the defendant had its agents personally investigate the loss and damage to the said automobile, and personally inspect and examine the wreck of the said automobile, and that at all times, the said defendant and its said agents were fully advised as to the time and cause of the [37] loss or damage to the said automobile and the interest of plaintiff and all others in the said automobile, and the defendant's said agents advised the plaintiff that it was not necessary for him to employ attorneys, or counsel, and that he would injure his prospect of procuring a settlement with defendant by doing so, and stated further to plaintiff that defendant denied any and all liability

under said Policy of Insurance for the reason that the loss and damage suffered by plaintiff was due to a defective axle and the breaking thereof; and by such advice and statement and conduct the plaintiff was led to believe, and did believe, that no further Proof of Loss was necessary or required, and relying thereon, plaintiff delayed the rendering of his sworn Statement of Loss until the 16th day of December, 1921. That, nevertheless, the plaintiff did, on or about the 16th day of September, 1921, make and mail to the defendant and its agents, by letter duly addressed, postage prepaid and deposited in the United States Postoffice, a statement, signed and sworn to by plaintiff, stating the knowledge and belief of the plaintiff as to the time and cause of the loss, or damage, the interest of the plaintiff, and of all others in the said property. That said notice of loss and sworn statement were, as plaintiff is informed and believes, received by the defendant in due course of mail, and the defendant did not, within a reasonable time, or at all, specify any grounds of objection to them or either of them, and did not, within a reasonable time or at all, make objection to the said notice of loss or sworn statement above referred to, or to either of them, and that defendant, by its failure to make objection to the said notice of loss, and proof of loss, waived all defects, if any, therein, and waived any defense that it might otherwise have, based upon the ground of delay in the presentation thereof.

FOR REPLY to the further and fifth affirmative defense in defendant's answer contained,

Plaintiff admits the allegations contained in paragraphs 1 and 11, thereof, except for the error in Exhibit 1, attached to defendant's answer and heretofore referred to.

Admits that the appraisers met at Havre, Montana, on or about the 15th day of January, 1922, and proceeded to examine the car and determine what was necessary to be supplied, and cost thereof, and total amount of damage to said car.

Denies generally each and every other allegation in said fifth [38] affirmative defense contained.

WHEREFORE, plaintiff prays for judgment according to the prayer of its complaint herein.

J. P. DONNELLY,

NOLAN & DONOVAN,

Attorneys for Plaintiff.

State of Montana,

County of Cascade,—ss.

Louis P. Donovan, being first duly sworn on oath, deposes and says: that he is one of the attorneys for the plaintiff herein, that he has read the foregoing reply, and knows the contents thereof, and that the same are true, to the best of his knowledge, information and belief.

LOUIS P. DONOVAN.

Subscribed and sworn to before me this 1st day of Sept., 1922.

[N. S.]

NANCY CARROLL,

Notary Public for the State of Montana, Residing at Great Falls, Mont.

My commission expires Aug. 11, 1924. [39]

State of Montana,
County of Cascade,—ss.

Louis P. Donovan, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for plaintiff herein; that he served the foregoing reply upon George Shelton, Esquire, the attorney for defendant herein, by depositing the same in the United States Postoffice, at Great Falls, Montana, on the 1st day of September, 1922, contained in an envelope, duly addressed to the said George Shelton at his residence at Butte, Montana, with postage thereon prepaid.

LOUIS P. DONOVAN.

Subscribed and sworn to before me, this 1st day of September, A. D., 1922.

[Seal]

NANCY CARROLL,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires August 11, 1924.

Reply. Filed Sept. 1, 1922. C. R. Garlow, Clerk.
[40]

Thereafter on September 25, 1922, said cause was tried and submitted to the Court on an agreed statement of facts; and thereafter on November 11, 1922, the Court rendered its decision herein, which agreed statement of facts and decision of the Court are set forth in the defendant's bill of exceptions

herein which was duly signed, settled and allowed by the Court on November 24, 1922, and is in the words and figures following, to wit: [41]

In the District Court of the United States in and
for the District of Montana.

No. 1053.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY,

Defendant.

Bill of Exceptions.

This cause having come on to be heard on the 25th of September, 1922, a trial by jury having been expressly waived in the manner required by the statutes of the United States, and the case thereupon was tried to the Court upon the following agreed statement of facts, to wit:

Agreed Statement of Facts.

“It is hereby agreed by and between the parties to the above-entitled action that the accident occurred in the following manner, to wit:

That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and

resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. [42] That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred dollars (\$3,900.00) with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum.

All other defenses on the part of the defendants are abandoned.

Dated this 25th day of September, 1922."

J. P. DONNELLY,

NOLAN & DONOVAN,

Attorneys for Plaintiff.

EARLE N. GENZBERGER,

J. W. FREEMAN and

GEORGE F. SHELTON,

Attorneys for Defendant.

And it is further understood and agreed by and between the Court and counsel for the representative parties that the alleged collision occurred in Hill County, Montana, on the 18th day of July, 1921, and that the insurance policy in question and the collision clause thereof, are the printed forms of policy and collision clause prepared and used by the defendant.”

And thereupon after argument of counsel, the case was submitted to the Court and thereafter on the 11th day of November, 1922, the Court rendered a decision and opinion in writing, which said opinion and decision of the Court is as follows, to wit:

Decision.

“This action for damages to plaintiff’s auto insured by defendant, a New Jersey corporation, after issue joined and jury waived is tried to the Court on the following ‘Agreed Statement of Facts.’ ”

“It is hereby agreed by and between the parties to the above-entitled action that the accident occurred in the following manner, to wit:

“That while plaintiff was driving the said automobile upon [43] the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to

cause the same to pivot and overturn and that the damage resulted therefrom; that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of \$3,900 with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum.

“All other defenses on the part of the defendant are abandoned.”

The policy issued in Montana and dated July 3, 1921, insures “against direct loss or damage caused . . . by the perils specifically insured against.” Those perils are fire, lightning, theft, robbery, pilfering, those “while being transported in any conveyance by land or water,—stranding, sinking, collision, burning or derailment,” and those within the following “collision clause.”

“(Covering damage sustained in excess of \$100)
(Deductible)

“In consideration of an additional premium of \$50.00 this policy also covers subject to its other conditions, damage to the automobile or equipment herein described in excess of \$100.00 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object, excluding (1) loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble; and excluding in any event loss or damage to any tire unless caused in an accidental collision which also causes other loss or damage to the insured automobile.”

From the “agreed statement” it appears that the auto moving rapidly over the road, the front axle broke, and the frame dropped to the road, and the energy of forward motion resisted, caused the axle and frame to penetrate the road surface and the auto to pivot and overturn, coming into violent contact with the earth, resulting in damage to the auto as aforesaid.

The only issue is whether this occurrence was a “collision” [44] within the meaning of the “collision clause.”

When this policy issued, the definition of “collision” in auto insurance was in process of development and extension beyond that popular or ordinary and to include some if not any unusual contact between auto and road or earth.

There is some conflict in court decisions, but in the courts of defendant's domicile and in some others the law was fairly settled that an occurrence like or analogous to this at bar was a "collision" within the meaning of the word in auto insurance.

See *Harris vs. Co.* (N. J.), 85 Atl. 194; *Universal Service Co. vs. Co.* (Mich.), 181 N. W. 1007. All decisions relating to the subject, extant when this policy issued are reported or referred to in 14 A. L. R. 179-212. See also *Moblac vs. Co.* (Cal.), 200 Pac. 764. In these cases the meaning of the word "collision" is extensively set out and so needs no repetition here. Because of this development and extension of the word's meaning, some insurance companies in policies insert express exclusions of contacts with roadbed or way, ditch or gutter, railroad ties or rails, or those contacts with the earth or other object primarily due to upsets or overturns. None of these exclusions are in this policy, but there is a limited one of "loss or damage to any tire due to puncture, cut, gash, blowout or other ordinary tire trouble" due to being in accidental collision with any other automobile, vehicle, or object.

That is, from the possible or probable meaning of "collision" defendant expressly excluded tire damage from contact with glass, tacks, or stones and other hard objects on the surface or imbedded and a part of road or earth, or from contact with ruts, depressions or other surface irregularities.

This must have been done lest otherwise these common incidents of an auto's ordinary progress

be held to be within the meaning of "collision" as used in this policy, and it is indicative that unexcluded [45] contacts with road or earth causing other than tire damage, were by the parties deemed to be within the meaning of the "collision clause" aforesaid. In view of the premises and the rules of interpretation applicable thereto, it is believed that the damage to plaintiff's auto was caused by a collision within the intent of the policy in suit.

The simplest ordinary definition of "collision" is "a striking together of two objects." The road and earth are objects. Defendant dictated this policy with the foregoing limited express exclusions, and presumptively with knowledge of the development and extension of the meaning of "collision" in the usage of auto insurance, of the conflicting court decisions including those of the courts of defendant's domicile, and of the initiated practice to insert in policies express exclusions from collisions to any extent desired by the insurer.

In these circumstances the rule is that if the policy contains words of several meanings in insurance usage, that meaning most favorable to the insured will be adopted. It is not overlooked that the word "collision" in the policy in respect to vessels and cars is used in a more restricted sense. Apparently it does not import contacts with the earth, for to include that contingency the word "stranding" is used in respect to vessels and the word "derailment" in respect to cars. But the rule that the same words are presumed to be used in the same sense, in a written instrument, yields to other

words and circumstances disclosing a different intent.

The findings are of the foregoing and for plaintiff, from which it is concluded plaintiff is entitled to recover of and from defendant in the amount set out in the agreed statement."

"Judgment accordingly."

"November 11, 1922."

"BOURQUIN,
J."

"Decision filed Nov. 11, 1922."

"C. R. GARLOW,
"Clerk." [46]

And to which decision and opinion of the Court the defendant then and there duly excepted. Now, within the time allowed by the rules of this Court, the defendant presents this its bill of exceptions and asks the Court that the same may be allowed by the Court as a true bill of exceptions and that thereupon, the same may be settled, allowed and ordered filed in the cause as a bill of exceptions therein; which is thereupon done accordingly and the same is settled and allowed as a true bill of exceptions in the case and ordered filed in the said cause as a bill of exceptions therein, this 24th day of Nov., 1922.

BOURQUIN,
Judge.

Service of the foregoing drafts of the bill of exceptions accepted and the receipt of a copy thereof acknowledged this 15th day of November, 1922.

J. P. DONNELLY,
NOLAN & DONOVAN,
Attorneys for Plaintiff.

Filed Nov. 24, 1922. C. R. Garlow, Clerk. [47]

That on the 17th day of November, 1922, judgment was duly entered herein, in the words and figures following, to wit: [48]

In the District Court of the United States in and
for the District of Montana.

No. 1053.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, a Corporation,

Defendant.

Judgment.

This cause coming on regularly for trial on September 25, 1922, at Great Falls, Montana, the plaintiff appearing by Louis P. Donovan, Esq., and the defendant by George F. Shelton, Esq.; and the cause being submitted to the Court upon an agreed statement of facts and without a jury (a jury having been expressly waived by both parties to this action); after submission to the Court of the agreed statement of facts and the arguments of counsel, the Court on the 11th day of November, 1922, made

and filed its decision, finding in favor of the plaintiff and against the defendant for the sum of Thirty-nine Hundred (\$3900.00) Dollars, with interest at the rate of eight per cent per annum from March 19, 1922, and for costs of suit.

WHEREFORE by virtue of the law and the premises it is ordered and adjudged that the said plaintiff have and recover from the defendant Four Thousand One Hundred and One and 05/100ths (\$4101.05) Dollars, being the amount of principal and interest to the date of decision as aforesaid together with costs and disbursements incurred in the sum of One Hundred Twenty-six and 75/100 Dollars, together with interest on the said judgment at eight per cent per annum until paid.

Entered November 17th, 1922.

[Seal]

C. R. GARLOW,
Clerk. [49]

And thereafter on December 22, 1922, a petition for a writ of error was duly filed herein, which is in the words and figures following, to wit: [50]

In the District Court of the United States for the
District of Montana.

No. 1063—AT LAW.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, (a
Corporation),

Defendant.

Petition for Writ of Error.

And now comes New Jersey Insurance Company, a corporation, defendant herein, and says that on or about the 17th day of November, 1922, this Court entered into judgment herein in favor of the plaintiff against defendant, in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

GEORGE F. SHELTON,

Attorney for Defendants.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [51]

Thereafter on December 22, 1922, an assignment of errors was duly filed herein, which is in the words and figures following, to wit: [52]

In the District Court of the United States for the
District of Montana.

No. 1063—AT LAW.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY, (a
Corporation),

Defendant.

Assignment of Errors.

The defendant in this action, in connection with its petition for a writ of error, makes the following assignment of errors which it avers occurred upon trial of the cause, to wit:

I.

The Court erred in holding that the following facts set forth and specified in the Agreed Statement of Facts are as follows, to wit:

“That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour and was crossing a coulee that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom, that the said damage

was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred dollars (\$3,900.00) with interest thereon from the 19th day of March 1922, at the rate of 8 per cent per annum,"

constituted an accidental collision with any other automobile, vehicle or object.

II.

The Court erred in holding that under the agreed statement of facts as above set forth, that damage to plaintiff's automobile caused as specified therein was within the risks covered by the policy of insurance.

III.

The Court erred in holding that under the said Agreed Statement of Facts that the direct and proximate cause of the damage to plaintiff's automobile was a collision with the surface of the roadway

along which plaintiff was traveling and not the defective condition of the front axle whereby same broke and let the car down to the earth and plowed into same. [53]

IV.

The Court erred in ordering judgment for the plaintiff and against the defendant.

WHEREFORE the defendant prays that the judgment of the District Court may be reversed.

GEORGE F. SHELTON,

Attorney for Defendant.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [54]

Thereafter on December 22, 1922, an order allowing a writ of error was duly filed and entered herein, being in the words and figures following, to wit: [55]

In the District Court of the United States for the
District of Montana.

No. 1063.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY (a
Corporation),

Defendant.

Order Allowing Writ of Error.

This 22d day of December, 1922, came the de-

fendant, by its attorney, and filed herein and presented to the Court its petition praying for the allowance of the writ of error, an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the 9th Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof the Court does allow the writ of error upon the defendant giving bond according to law, in the sum of Forty-five Hundred Dollars, which shall operate as a supersedeas bond.

BOURQUIN,

Judge.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [56]

Thereafter on December 22, 1922, a bond on writ of error was duly filed herein, being in the words and figures following, to wit: [57]

In the District Court of the United States for the
District of Montana.

No. 1063.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY (a
Corporation),

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that New Jersey Insurance Company, a corporation, as principal, and Aetna Casualty and Surety Company, of Hartford, Connecticut, are held and firmly bound unto the defendant in error, C. W. Young, in the full and just sum of Forty-five Hundred Dollars, to be paid to the said defendant, C. W. Young, his certain attorneys, executors, administrators, or assignes, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents. Sealed with our seals, and dated this 22d day of December, A. D. 1922.

WHEREAS, lately at a District Court of the United States for the District of Montana, in a suit depending in said court, between C. W. Young, plaintiff, and New Jersey Insurance Company, a corporation, defendant, a judgment was rendered against the said defendant, New Jersey Insurance Company, and the said defendant having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said C. W. Young, citing and admonishing him to be and appear at a session of the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, State of California, in said Circuit, on the 22d day of January next.

Now, the condition of the above obligation is such, that if the said New Jersey Insurance Company

shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said plea good, then the above obligations to be void; else to remain in full force and virtue.

NEW JERSEY INSURANCE COMPANY.

By GEORGE F. SHELTON,

Its Attorney.

THE AETNA CASUALTY AND SURETY
COMPANY.

PAUL WOLCOTT,

Resident Vice-President.

[Seal]

Attest: SIBYL G. ZOBEL,

Resident Asst. Secretary.

Approved by

BOURQUIN,

District Judge.

Filed Dec. 22, 1922. C. R. Garlow, Clerk. [58]

1

Thereafter, on December 22, 1922, a writ of error was duly issued herein, which original writ of error is hereto annexed and is in the words and figures following, to wit: [59]

The United States Circuit Court of Appeals for the
Ninth Circuit.

Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Montana, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, or some of you, between C. W. Young, plaintiff, and New Jersey Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, New Jersey Insurance Company, as by its complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 22d day of Jan. next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being in-

spected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable WILLIAM H. TAFT, Chief Justice of the United States, this 22d day of December, A. D. 1922, and in the 146th year of the Independence of the United States of America.

Allowed by: BOURQUIN,
United States District Judge.

[Seal] Attest: C. R. GARLOW,
Clerk of the District Court of the United States, for
the District of Montana.

By L. R. Polglase,
Deputy Clerk. [60]

Return to Writ of Error.

In obedience to the command of the within writ, I herewith transmit to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, a duly certified transcript of the record and proceedings in the within-entitled cause, with all things concerning the same.

By the Court.

[Seal] C. R. GARLOW,
Clerk U. S. District Court, District of Montana.
[61]

[Endorsed]: #1053. The United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Ninth Judicial Circuit,—ss. Writ of Error. Filed Dec. 23, 1922. C. R. Garlow, Clerk. [62]

Thereafter, on December 22, 1922, a citation was duly issued herein, which original citation is hereto annexed and is in the words and figures following, to wit: [63]

The United States Circuit Court of Appeals for the Ninth Circuit.

Citation on Writ of Error.

The United States of America,
Ninth Judicial Circuit,—ss.
To C. W. Young.

You are hereby cited and admonished to be and appear at a session of the United States Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, in said circuit, on the 22d day of Jan. next, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the District of Montana, wherein New Jersey Insurance Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable GEORGE M. BOURQUIN, District Judge of the United States, at Butte, Montana, within said circuit, this 22d day of December, in the year of our Lord one thousand

nine hundred twenty-two, of the Independence of the United States of America the one hundred and forty-sixth (146) year.

BOURQUIN,
United States District Judge.

I hereby this 22d day of December, 1922, accept due personal service of this citation on behalf of C. W. Young, defendant in error.

JOSEPH P. DONNELLY,
LOUIS P. DONOVAN,
TIMOTHY NOLAN,
Attorneys for Defendant in Error. [64]

[Endorsed]: #1053. The United States Circuit Court of Appeals for the Ninth Circuit. The United States of America, Ninth Judicial District,—ss. Citation. To C. W. Young. Filed Dec. 22, 1922. C. R. Garlow, Clerk. By L. R. Polglase, Deputy. [65]

And thereafter, on December 30, 1922, a praecipe for transcript on writ of error was duly filed herein, being the words and figures following, to wit: [66]

In the District Court of the United States in and
for the District of Montana.

C. W. YOUNG,

Plaintiff,

vs.

NEW JERSEY INSURANCE COMPANY,
Defendant.

Praecipe for Transcript of Record on Writ of Error.

To the Clerk of the United States District Court
for the District of Montana.

In preparing the copy of the record for transmission to the Circuit Court of Appeals for the 9th Circuit, under the writ of error sued out and the citation issued on the application of New Jersey Insurance Company, the defendant, please incorporate in the record copies of the following documents and papers, to wit: Complaint, answer, reply, bill of exceptions, judgment, petition for writ of error, assignment of errors, order allowning writ of error, writ of error, bond, citation.

GEORGE F. SHELTON,
Attorney for Plaintiff in Error and Defendant,
New Jersey Insurance Company.

Copy received this 29th day of December, 1922.

J. P. DONNELLY,
L. P. DONOVAN,
TIMOTHY NOLAN,
Attorneys for Plaintiff.

Filed Dec. 30th, 1922. C. R. Garlow, Clerk. [67]

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Montana,—ss.

I, C. R. Garlow, Clerk of the United States Dis-

trict Court for the District of Montana, do hereby certify and return to the Honorable, The United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 67 pages, numbered consecutively from 1 to 67, inclusive, is a full, true and correct transcript of the record and proceedings has in the within entitled cause, and of the whole thereof, required to be incorporated in the record on writ of error therein by praecipe filed, as appears from the original records and files of said court in my custody as such Clerk; and I do further certify and return that I have annexed to said transcript and included within said pages the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of thirty & 65/100 Dollars (\$30.65), and have been paid by the plaintiff in error.

WITNESS my hand and the seal of said court at Helena, Montana, this 11th day of January, A. D. 1923.

[Seal]

C. R. GARLOW,

Clerk. [68]

[Endorsed]: No. 3969. United States Circuit Court of Appeals for the Ninth Circuit. New Jersey Insurance Company, a Corporation, Plaintiff in Error, vs. C. W. Young, Defendant in Error. Transcript of Record. Upon Writ of Error to the

United States District Court of the District of
Montana.

Filed January 15, 1923.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3969

IN THE
United States Circuit Court
of Appeals

For the Ninth Circuit

NEW JERSEY INSURANCE COM-
PANY (a corporation),

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GEORGE F. SHELTON,
JAMES W. FREEMAN,

Counsel for Plaintiff in Error.

No. 3969.

IN THE
**United States Circuit Court
of Appeals**

For the Ninth Circuit

NEW JERSEY INSURANCE COM-
PANY (a corporation),

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case is here on a writ of error to the United States District Court for the District of Montana, sued out by New Jersey Insurance Company, a corporation, defendant below, plaintiff in error here, to reverse a judgment rendered against it in favor of C. W. Young, plaintiff below, defendant in error here, be-

cause of certain errors set forth in the Assignment of Errors.

The suit was brought by C. W. Young, against the New Jersey Insurance Company, on a policy of insurance to recover for damage done to an automobile designated as "Marmon" "Type B" "4 passenger" "factory No. 4220048," "Motor No. 6983," described in said policy.

The right to recover is asserted under the collision clause attached to the policy. There was an award made by appraisers and the amount of loss sustained by assured determined thereby. There was a non-waiver agreement entered into between insured and insurer.

The case was tried to the court (a trial by jury having been expressly waived in the manner required by the statutes of the United States), on an agreed statement of facts.

The court handed down its decision in favor of Young against this Company and ordered judgment in favor of Young and against this Company, and judgment was duly given, made and entered in accordance therewith.

To reverse said judgment plaintiff in error has sued out the writ of error herein.

Young in his complaint alleges that on the 3rd day of July, 1921, in consideration of a specified premium paid, the insurance company made and delivered to him its policy of insurance, a copy of which is annexed to the complaint; and thereby insured him in the sum named and "against damage to the said automobile

or equipment in excess of one hundred dollars, by being in accidental collision during the period insured with any other automobile, vehicle or object."

He then goes on to allege: "That on the 18th day of July, 1921, while said insurance policy was in full force and effect and the automobile therein described was being operated by plaintiff upon the public highway in Hill County, Montana, the said automobile was completely wrecked, damaged and destroyed, by the front axle of said automobile coming and being in accidental collision with the surface of the road, upon which plaintiff was at said time driving, whereby said automobile was overturned and wrecked and its value thereby impaired and destroyed."

The collision clause in the policy upon which Young relies for his recovery reads as follows:

"In consideration of an additional premium of \$50.00 this policy also covers subject to its other conditions, damage to the automobile and/or equipment herein described in excess of \$100 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object."

In the answer filed by the Insurance Company to the complaint of the plaintiff, said Company in its first affirmative defense specifically sets forth that part of the collision clause in the policy above quoted, and alleges as follows:

“That on or about the 18th day of July, 1921, at the time mentioned and specified in the complaint of the plaintiff on file herein, the said automobile of said plaintiff, while being operated by plaintiff upon the public highway in Hill County, Montana, was wrecked and damaged in the manner following, to wit, and not otherwise: The front axle of said automobile for some reason unknown to the defendant, broke and by reason thereof, the said automobile was overturned, and the injury and damage to the same occasioned, and produced by reason of the said breaking of said axle and the overturning of said automobile; that the said automobile did not come into accidental collision or otherwise with the surface of the road upon which the same was at said time being driven until by reason of breaking of said front axle said car was overturned and wrecked. That the breaking of said axle was the direct and proximate cause of damage and injury to said car; that there was no collision with any other automobile, vehicle or object, and that the loss and damage to the said automobile was caused by reason of the said breaking of the said front axle of same and not otherwise.

“That the fact that said front axle of said automobile broke and caused said automobile to be overturned and wrecked was not within the terms of the policy of insurance above quoted and was not an accidental collision within the terms and meaning of the risks insured against in said policy and that by reason thereof the said plaintiff has no grounds for the relief sought to be recovered in this action against said defendant.”

Young in his reply to the affirmative matter above quoted in the answer of the Company, denies the same and takes issue thereon.

When the case was called for trial it was submitted to the Court upon the following agreed statement of facts:

“It is hereby agreed by and between the parties to the above-entitled action that the accident occurred in the following manner, to wit:

“That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom; that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is

within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred dollars (\$3,900.00) with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum.

“All other defenses on the part of defendants are abandoned.”

The court rendered its decision in favor of Young and against the Company and ordered judgment rendered in favor of Young and against the Company.

Two questions were presented for the decision of the court and both were decided by the court contrary to the contention of the Insurance Company. One, whether the collision clause in the policy covered the loss, that is, whether the facts admitted established that the damage was caused to the automobile or equipment by being in accidental collision during the period insured, with any other automobile, vehicle, or object, and second, whether the fact that the front axle of the automobile broke because the same was defective and was cracked so as to substantially weaken the same, and that this was the proximate cause of the accident, precluded a recovery by Young under the policy.

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that the following facts set forth and specified in the Agreed Statement of Facts, to wit:

“That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour and was crossing a coulee that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom, that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred

dollars (\$3,900) with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum," constituted an accidental collision with any other automobile, vehicle or object.

II.

The court erred in holding that under the agreed statement of facts as above set forth, that damage to plaintiff's automobile caused as specified therein, was within the risks covered by the policy of insurance.

III.

The court erred in holding that under the said Agreed Statement of Facts that the direct and proximate cause of the damage to plaintiff's automobile was a collision with the surface of the roadway along which plaintiff was traveling and not the defective condition of the front axle whereby same broke and let the car down to the earth and plowed into same.

IV.

The court erred in ordering judgment for the plaintiff and against the defendant.

ARGUMENT.

THE LOSS SUSTAINED WAS NOT WITHIN THE RISKS INSURED AGAINST IN THAT THERE WAS NOT AN ACCIDENTAL COLLISION WITH "ANY OTHER AUTOMOBILE, VEHICLE OR OBJECT."

The complaint describes the manner in which the loss occurred as follows:

"That on the 18th day of July, 1921, while said insurance policy was in full force and effect, and the automobile therein described was being operated by plaintiff upon the public highway in Hill County, Montana, the said automobile was completely wrecked, damaged and destroyed by the front axle of said automobile coming and being in accidental collision with the surface of the road upon which the plaintiff was at said time driving, whereby said automobile was overturned and wrecked and its value thereby impaired and destroyed." (Record, page 3.)

In the Agreed Statement of Facts the manner in which the accident occurred and the cause thereof is described as follows:

"That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed

into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn and that the damage resulted therefrom that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same." (Record, pages 53-54.)

Leaving out of consideration for the time being the admitted fact that the proximate cause of the accident was the breaking of the defective axle, the question presented for consideration is whether the fact that the end of the broken axle and the front end of the car came in contact with the surface of the road along which the car was being driven, constituted an "accidental collision" with any other "object" within the meaning of the policy of insurance. In other words, was the surface of the road another "object" within the meaning of the collision clause of the policy.

The auto was moving rapidly over the road within the limits of the highway. The front axle broke from a defect therein; the end of the axle dropped to the surface of the road. There was nothing in the road in the nature of an obstruction save the surface thereof.

When the end of the axle struck the surface of the road it penetrated the same and the auto pivoted and overturned.

The language of a contract is to be construed in its popular and usual significance and this rule applies to contracts of insurance as well as other contracts.

In the case of *Bell vs. American Ins. Company* (Wis.), 181 N. W., 733, the Supreme Court of Wisconsin had under consideration a policy of insurance containing the exact language involved in the present case. The facts in that case as disclosed were similar to the facts in this case, in that one side of the car settled into the ground and the car tipped over. The plaintiff sought to recover damage resulting to the car by its coming into contact with the ground at the time of the upset. The sole question presented was whether under the terms of the policy this constituted a collision within the meaning of the terms thereof. The court held that the policy insuring the plaintiff against damage resulting to his automobile by "being in accidental collision" during the period insured with any other "automobile, vehicle or object" was not an obligation to indemnify plaintiff for damage to his car when, while on the highway, one side of it gradually settled into the ground and the car tipped over, striking the ground to its damage; such casualty not being a "collision" as the word is commonly understood.

The court said: "As we construe the clause quoted, it has no reference to damage caused by upsets."

In its conclusion the court says: "This requires us to determine whether the forcible contact of the auto-

mobile with the ground as a result of the upset constitutes a collision," and after quoting the Century dictionary and Webster's dictionary, the court says: "We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular understanding a collision does not result, we think from the force of gravity alone. Such an application of the term lacks the support of "widespread and frequent usage."

A persuasive reason used by the court in that case is the doctrine of "*ejusdem generis*," in accordance wherewith to entitle plaintiff to recover, the collision must have occurred with another "automobile, vehicle or some similar object."

The court, however, in that case referred to the case of *Wettingel vs. U. S. Lloyds*, 157 Wis., 433.

Quoting the doctrine in that case, in which it was held that the word "object" must be construed to be a similar object and held that the word "collision," within the meaning of the clause above quoted would include a collision with objects other than automobiles. The court, however, expressly held that the surface of the road bed was not an "object" within the meaning of that clause.

In the case of *Moblal vs. Western Indemnity Company* (Cal.), 200 Pac., 750, the language of the policy read as follows:

"If caused solely by collision with another object." The facts as disclosed in the case were that the driver

of said automobile to avoid striking another automobile, swerved to the outer edge of the roadway, and the said road-way gave way, causing said automobile to run down an embankment, and after leaving said roadway to overturn, and roll down the side of a mountain; that plaintiff's said automobile did not strike or collide with any other "object" upon said road way; nor did said automobile strike or collide with any object upon the said embankment or mountain side prior to the time said automobile overturned."

The sole question in that case was whether the damage was caused solely by collision with another "object" within the meaning of the clause of the policy quoted.

The court referred to the case of *Bell vs. American Ins. Company* (supra), and quoted with approval the language of the court in that case and in conclusion, said as follows: "In the instant case, the damage to plaintiff's car was caused proximately by its turning over on the edge of the road. Its subsequent revolutions and consequent damage were but the operation of physical laws set in motion when it turned over on the edge of the road. The proximate and only cause of the accident was not a collision, but the upsetting of the automobile."

In the case of *Southern Casualty Company vs. Johnson* (Ariz.), 207 Pac., 987, the language of the policy is the same as in the present case and the court held that a policy of insurance insuring an automobile against collision does not cover damage resulting from the overturning of the automobile when it ran up on

a bank along the side of the road and overturned without colliding with any "object."

In that particular case the court affirmed a judgment in favor of the plaintiff because it appeared that the automobile was overturned as the result of a collision and under such circumstances the plaintiff could recover. That does not, however, in any way affect the result in this case, for the reason that the proximate cause of the accident was not a collision within the meaning of that word as defined in the authorities given.

In the case of *Stuht vs. U. S. Fidelity & Guaranty Co.* (Wash.), 154 Pac., 138, the language of the policy varies somewhat from that in the present case; the language of that policy being as follows:

"If caused solely by collision with another object, either moving or stationary (excluding, however, all loss or damage by fire from any cause whatsoever, all loss or damage caused by striking any portion of the roadbed, or by striking street or steam railway rails or ties; and all loss or damage caused by the upset of the injured automobile unless such upset is a direct result of such a collision as is covered hereby."

In reversing a judgment for plaintiff and ordering the case dismissed, the court said:

"We have no doubt, from the plaintiff's own evidence, that this was a clear case of the car upsetting upon the brink of a precipice without any other cause. It was the duty of the trial

court, therefore, to have directed a verdict upon the first motion made by the defendant, because the policy provides that if the damage is caused by an upset of the injured automobile, unless such upset is the direct result of a collision such as is covered thereby, such damage is not insured against. There was no collision with any object shown."

In the case of Hardenburgh vs. Employer's Liability Assurance Corporation, 141 N. Y. S., 502, the language of the policy is similar to that quoted in *Stuht vs. U. S. Fidelity & Guaranty Company* (supra), in that case the accident is described as follows:

"The automobile which was injured was running along a road in New Jersey. In this instance the side of the road sloped from the edge of the macadam roadbed at an angle of 30 to 45 degrees into a deep ditch. At a turn in the road the machine met a horse and wagon approaching from an opposite direction. The automobile turned out of the road upon the side of the ditch, the hind wheels 'skidding' on the turn, thus throwing the rear of the machine further into the ditch than the front wheels. In attempting to regain the road the right-hand front wheel collapsed, and the automobile turned over twice, and was badly broken and seriously damaged."

The court said:

"The burden rested upon the plaintiff to prove that the damage sustained was the result of collision with some 'object, either moving or sta-

tionary.' Proof was given of the above facts, and the court inferred that there must have been a collision. There was no evidence given of the existence of any object with which the automobile did or could have come into collision. If we are to speculate upon the causes of the injuries to the machine, the facts point more strongly to the collapse of the wheel from strain than from collision. It was shown that the earth was soft on the side of the ditch and the wheels that left the road sunk three or four inches into the earth. The spokes of the right front wheel were all broken off at the hub."

Reference is made in the decision of the court in this case to the decision of the court in the case of *Harris vs. American Casualty Company* (N. J.), 85 Atl., 194, which is claimed to hold a doctrine contrary to that of the *Bell* case. In that case by the terms of the policy, it covers loss or damage to any automobile resulting solely from collision with any "moving or stationary object" excluding however "damage resulting from collision due wholly or in part to upsets. The facts in the case were as follows:

"The plaintiff in error was the owner of an automobile which was being driven by his chauffeur over a bridge on the highway between Atlantic City and Pleasantville. The sides of the bridge were protected by guard rails made of posts and planking. The car crashed through the rail on one side, and was precipitated into the stream below. The machine turned upside down after

leaving the bridge, and rested in an inverted position on the bed of the stream."

The court held that the facts showed that the upset was caused by a collision and that therefore the plaintiff could recover. The court held also in that case that the word "object" would include the water of the stream and the earth beneath it; but the facts in that case have no similarity to the facts in the case before the court, and the terms of the policy are entirely different from those in the present case, and the fact that there was an actual collision with the railing of the bridge which caused the car to be upset, deprived that case of any persuasive character whatever and the case itself was entirely disregarded and disapproved in the Bell case.

The other case referred to by the court in its opinion "Universal Service Company vs. American Insurance Company (Mich.), 181 N. W., 1007, held: "That the striking of an auto truck by the falling on to it from above of the scoop of a steam-shovel with which the truck was being loaded is a collision within the meaning of the policy. There is this significant statement to be found in the opinion of the court:

"The record does not contain a copy of the rider so we have not its specific language before us, the case having been submitted upon an agreed statement of facts in which it appears that there was 'full coverage collision' insurance."

In that case the decision of the court in the absence of any statement as to the clause in the policy sued on

and in view of the facts as disclosed, has no bearing and is not persuasive in the present case.

In the case of *O'Leary vs. St. Paul F. & M. Ins. Co.* (Tex. Civ. App.), 196 S. W., 575, the automobile was injured while standing in a garage by the falling of the second floor, it was held that the company was not liable upon a policy insuring against damage and loss by collision.

Under the decisions and under the definitions, the word "collision" would indicate a striking together of two objects, one of which may be stationary, but that the surface of the road along which the car is moving is an object within the meaning of the policy of insurance, is contrary to the decision of the cases above cited. No case can be found or has been found which sustains the view announced by the trial court in its decision in this case.

II.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE BREAKING OF THE FRONT AXLE OF THE CAR THROUGH THE DEFECT THEREIN.

Referring again to the language of the complaint "the said automobile was completely wrecked, damaged and destroyed by the front axle of said automobile coming and being in "accidental collision" with the surface of the road upon which the plaintiff was at said time driving." In the agreed statement of facts it is stated that "the front axle of the car broke and thereupon the broken axle and frame of the car was let

down to the earth. That the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth, after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle, the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary careful observation."

The proximate cause therefore of the accident was the breaking of the axle, through the latent defect therein.

The language of the policy insured against "direct loss or damage caused while this policy is in force by the perils specifically insured against." (Record, page 7.)

The direct loss or damage to the car must have been caused in this instance by "accidental collision" with another object; that is the proximate cause of the loss or damage must have been the "accidental collision" with another object, but in this particular instance, according to the allegations of the complaint and the agreed statement of facts, the proximate cause was the breaking of the axle through a latent defect therein. The accident would not have occurred if the axle had not broken, the axle would not have broken if there had not been a defect therein.

In Joyce, Section 2832, the rule is stated:

“It may be generally stated that the loss in insurance cases must be proximately caused by a peril insured against and that the contract does not contemplate an indemnity to the assured where the peril is the remote cause of loss. This general principle or rule cannot be controverted and has been repeatedly and continually asserted.”

When determining whether a loss is within the terms of the policy where there is a concurrence of different causes, the efficient cause, the one that sets others in motion is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.

In the case of *Aetna Insurance Company vs. Boon*, 95 U. S., 117, 24:395, the Supreme Court said as follows:

“The question is not what cause was the nearest in time or place to the catastrophe. That is not the meaning of the maxim *causa proxima, non remota spectatur*. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster.”

The court cites many authorities to sustain this definition and quoting from the case of *Brady vs. Insurance Company*, 11 Mich., 425, said:

“That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed.”

In the case of *St. John vs. Insurance Company*, 11 N. Y., 519, the insurance was against fire, but the policy exempted the insurers from any loss occasioned by the explosion of a steam-boiler. A fire occurred, caused by an explosion, which destroyed the insured property. The court regarding the explosion and not the fire as the predominating cause of the loss, held the insurers not liable.

In the case of *Railway Company vs. Kellogg*, 94 U. S. 469, 24:256, the court in discussing what is the proximate and what the remote cause of an injury, said:

“The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating which produced the injury.”

In the case of *Insurance Company vs. Tweed*, 7 Wallace 44, 19:65, the insurance was against fire and covered certain bales of cotton in the Alabama warehouse in Mobile. The policy contained a provision that the insurers would not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion,

earthquake or hurricane. During the time covered by the policy an explosion took place in the Marshall warehouse situated directly across the street, which threw down the walls in the Alabama warehouse, scattered combustible materials in the street and resulted in an extensive conflagration, embracing several squares and buildings, among which the Alabama warehouse and the cotton stored in it were wholly destroyed. The only question was whether the explosion caused the fire which destroyed the cotton. In other words, was the explosion the proximate or the remote cause of the loss and in deciding the case the court said:

“One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause.”

In *The G. R. Booth*, 171 U. S., 450; 43:234, the court said:

“The case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was ‘occasioned by the perils of the sea’; or, in other words, whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim, *causa proxima, non remota spectatur*.”

The court said:

“In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff’s sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship’s side by the explosion.”

In the case of *Waters vs. Insurance Company*, 11 Pet., 213, 9:691, the court in passing upon the question of whether a policy of insurance upon a steamboat against perils of the rivers and of fire, covered a loss of the boat by fire caused by the barratry of the master and crew, in holding that it did not, stated:

“We have no hesitation to say that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry as its proximate cause, as it concurs as the efficient agent, with the element *co instanti*, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or rivers, though the flow of water should co-operate in producing the sinking.”

A somewhat similar case is the case of *Smith vs. Ins. Co.*, 6 Wheat., 176, 5: 235. The court said:

“The loss must be occasioned by some peril insured against. The peril must act directly and not circuitously, upon the subject of the insurance. It must be an immediate peril and the loss the proper consequence of it.”

In the case of *Texas, etc. Ry. Company vs. Coutourie*, 135 Fed., 465, the court in defining proximate cause said:

“‘Proximate’ is defined as ‘lying or being in immediate relation with something else,’ and as

synonymous with 'direct' or 'immediate.' 'Proximate cause: The nearest, the immediate, the direct cause; the efficient cause.' Anderson's dictionary of law, 155. The word 'direct' is defined as meaning 'free from intervening agencies or conditions; hence characterized by immediateness of relation or of action.' Standard Dictionary. And this is the meaning of a proximate cause as stated by the Supreme Court in *Milwaukee & St. Paul Railway Co. vs. Kellogg*, 94 U. S., 469, 24 L. Ed., 256, where the court says: 'The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self operating, which produced the injury.' "

In the case of *Hartford Steam Boiler, etc. Ins. Co. vs. Pabst Brewing Co.*, 201 Fed., 617, the court said:

"Various refinements which appear in the authorities in definitions of proximate cause do not require consideration for this inquiry as the rule we refer to is well recognized as elementary and of undoubted force for definition of insurance liability, namely: When concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one, that sets the other causes in operation, and causes which are incidental are not proximate, though they may be nearer in time and place to the loss."

In the case of *Phoenix Ins. Company vs. Bridge Co.*, 65 Fed., 628, the court said:

“The rule of law is well settled that, where a particular peril is insured against, in order to be entitled to indemnity the assured must show that the particular peril caused the loss. It is held that the peril which causes the loss is the one which is the predominating and efficient cause, the cause which produces the disaster without any new intervening cause, which of itself would have been sufficient to produce the result.”

In the case of *German Savings & Loan Society vs. Commercial, etc. Assurance Co.*, 187 Fed., 758, the Court of Appeals for the Ninth Circuit after reviewing the authorities and quoting from the decisions of the Supreme Court cited above, says:

“There can scarcely be two opinions as to the result of these authorities. The cause which is efficient to produce the injury, though it may not be the nearest in point of time or space, if continuous in its operation, passing from one effect to another without cessation until it has brought about the result, is the one to which the injury must be attributed. All intervening causes which are themselves the outgrowth of the primary cause are but incidental thereto, and are not regarded as efficient to produce the injury.”

It is apparent in the light of these authorities that the insurer undertook by the careful and full specification of the terms of the loss for which it stipulated indemnity could not and did not intend to indemnify the insured except for the loss occurring through the

peril specified, it did not insure nor intend to insure for loss occurring through the breaking down of the machine by reason of latent defects. The proximate cause as defined above which put in motion all of the other concurrent causes that brought about the damage to the machine was the inherent defect in the axle, which caused it to break and let the machine down upon the surface of the roadbed, and thereby caused it to be upset. Under the authorities above quoted and in view of the admitted facts in the case, the damage to the plaintiff's machine was brought about not by any peril insured against, namely "collision with another object," but as admitted by the pleadings and by the agreed statement of facts the efficient cause which set all the other activities in motion was the defective axle and the breaking thereof as the result of that defect.

As said in the case of *Moblad vs. Western Indemnity Company*, 200 Pac., 750:

"In the instant case, the damage to plaintiff's car was caused proximately by its turning over on the edge of the road. Its subsequent revolutions and consequent damage were but the operation of physical laws set in motion when it turned over on the edge of the road. The proximate and only cause of the accident was not a collision, but the upsetting of the automobile."

We therefore respectfully submit that there was no collision within the terms of the policy with any other object, and that the proximate cause of the accident

and the consequent damage to the automobile was not a collision, but the breaking of the axle, through a latent defect therein, and

We respectfully ask the court that the judgment of the court below, be reversed.

Respectfully submitted,

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James H. Freeman

Counsel for Plaintiff in Error.

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

NEW JERSEY INSURANCE COMPANY, a corporation,

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

JOSEPH P. DONNELLY,
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NEW JERSEY INSURANCE COMPANY, a Corporation,

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BRIEF OF DEFENDANT IN ERROR

ARGUMENT

The Transcript of Record herein contains the opinion of the Trial Court (Transcript, Pages 55-60), wherein the questions presented by this case are carefully considered and discussed. Necessarily this brief is, to a large extent, a repetition of matters set forth in the opinion of the Trial Court. We have, however, thought it advisable to file a Brief and, to add to the opinion of the Trial Court, such further argument and citations of authority as seem pertinent.

The case presents three questions:

1. Is the Earth an "object" within the meaning of the collision clause of the policy in question?
2. Is the violent striking of the car against the earth, due to the forward motion of the car upon the

road, a "collision" within the meaning of the collision clause of the policy?

3. The collision, being the immediate cause of the damage to the automobile, can the insurer avoid liability by merely showing that the collision was caused by the breaking of the axle?

We shall discuss these questions in the order in which they are stated.

I.

IS THE EARTH AN "OBJECT" WITHIN THE MEANING OF THE COLLISION CLAUSE OF THE POLICY IN QUESTION?

Obviously, the earth is an "object" within the ordinary meaning of that term. The word "object" is defined as "anything which comes before or in the way of the conscious mind through the senses; especially, anything tangible or visible."

Standard Dictionary.

But it will be argued that the word "object" as used in the collision clause of defendant's policy, should take a restricted definition by reason of the words preceding it; and that the doctrine of *Ejusdem Generis* should be applied. The Doctrine of *Ejusdem Generis* was applied to a collision clause similar to the one here under consideration in the case of:

Wettengel vs. United States "Lloyds" 157 Wisconsin 433, 147 N. W. 360, Ann. Cas. 1915 A., 626.

But that case was expressly overruled by the same court in

Bell vs. American Insurance Co., 181 N. W. 733, 14 A.L.R. 179.

when the question next came before it.

In the latter case the court said:

"It was held in *Wettengel v. United States "Lloyds,"* 157 Wis. 433, 147 N. W. 360, Ann. Cas. 1915A, 626, that the language of this policy provision did not cover the damages resulting to an automobile by its running off the main road and down a bank into a river. In that case the doctrine *eiusdem generis* was applied to the words "automobile, vehicle, or object," and it was held that, to entitle plaintiff to recover, the collision must have occurred with another automobile, vehicle, or some similar object. If the doctrine of that case is to be followed, the judgment must be for the defendant. It is urged by the appellant that the application of the doctrine *eiusdem generis* was unnecessary to the conclusion there reached, and that it was inadvertently applied and has no proper application to the words as used in the policy before us. It is pointed out that the doctrine of *eiusdem generis* does not apply when the specific words embrace all objects of their class, so that the general words must bear a different meaning from the specific words or be meaningless; that an automobile is a vehicle, and the terms "vehicle" includes everything in which persons or things can be carried or transported; hence, the words "automobile" and "vehicle" embrace all objects of their class, and the word "object" means a different kind of an object or it means nothing.

"By the rule of construction known as *eiusdem generis*, general words following particular words are limited to other species of the same genus. "The particular words are presumed to describe certain species, and the general words to be used for the purpose of including other species of the same genus. The rule is based on the obvious reason that, if the legislature had intended the general words to be used in their unrestricted sense, they would have made no mention of the particular classes." 36 Cyc. 1120. It has been held that the rule does not apply where the specific words embrace all objects of their

class, so that the general words must bear a different meaning from the specific words, or be meaningless. *United States Cement Co. v. Cooper*, 172 Ind. 599, 88 N. E. 69. We think the reason supporting the rule also dictates the exception, and that the exception applies to the words of this policy provision. Unless the word "object", as here used, be construed as including an object of a different class, it is meaningless, as the term "vehicle", it seems to us, includes every species within the genus. We are disposed to construe this provision as sufficiently broad to include a collision with objects other than automobiles or vehicles, and withdraw the contrary intimation made in *Wettengel v. United States "Lloyds"*, *supra*. This requires us to determine whether the forcible contact of the automobile with the ground, as a result of the upset, constitutes a collision."

14 A. L. R. 181, *Bell vs. American Insurance Company*, *Supra*.

The following cases are to the same effect:

Harris vs. American Casualty Co., 83 N. J. Law, 641; 44 L.R.A. (N.S.) 70, 85 Atlantic 194, Ann. Cas. 1914B, 846

Rouse vs. St. Paul F. & M. Insurance Co., 203 Mo. App. 603, 219 S. W. 688.

Southern Casualty Co. vs. Johnson, 207 Pac. (Ariz.) 987.

Universal Service Co. vs. American Insurance Co. of Newark, N. J., 181 N. W. (Mich.) 1007. 14 A.L.R. 183 and Note to above case.

That the doctrine of *ejusdem generis* should not be applied to the word "object" as used in the collision clause here in question, is further indicated by the provisions of the collision clause expressly "excluding (1) loss or damage to any tire due to puncture, cut,

gash, blowout, or other *ordinary* tire trouble." In ordinary experiences, punctures, cuts, gashes and blow-outs are due usually to contact with the road or things that lie in the road or constitute a part of the road, such as tacks, glass, sharp rocks, nails, ruts, curbing, et cetera: and the fact that the defendant took the pains to expressly exclude from the policy of insurance any damage due to such causes, indicates its own view, that otherwise such damage, which is "*ordinary* tire trouble," would be within the protection of the policy. The express exclusion of loss or damage due to "puncture, cuts, gash, blow-out or other *ordinary* tire trouble" precludes the construction which would also exclude from the protection of the policy, loss or damage due to other violent contacts with the road of an extraordinary nature.

It should be noted also that the decision in the case of Harris vs. American Casualty Company, was rendered by the Supreme Court of the Defendant's domicile some seven (7) years prior to the execution of the policy here under consideration. It must be assumed that that decision, in particular, as well as others holding that the earth was an "object" within the meaning of that term as used in a collision clause of the character under consideration, was in the mind of the defendant's counsel, when the collision clause here under consideration was drafted and prepared. Counsel for the defendant company must be held to have used the word "object" in this collision clause in the sense in which it had been defined by the Supreme Court of New Jersey, or else to have intentionally and deliberately

used a word susceptible of more than one construction. Either view leads to the same conclusion; because if defendant in writing its policy selected a word of uncertain meaning, then the court should give, to that word the meaning most favorable to the insured.

2 Elliot on Contracts Sec. 1528; Sec. 7545
Rev. Codes of Montana, 1921.

It should also be noted that the decision in Moblad vs. Western Indemnity Company (Cal. App.) 200 Pac. 750, is not in conflict with the views herein expressed, as to the meaning of the word "object." The decision in Moblad vs. Western Indemnity Company turned, not upon the definition of the word "object", but upon the definition of the word "collision." The District Court of Appeals held that since "none of the *objects* with which said automobile came in contact caused said automobile to leave the roadway, or to go down said embankment, or caused said automobile to over turn," there was no "*collision*" within the meaning of the policy. The Court apparently assumed that the road bed was an "*object*" within the meaning of the policy; but since there was no *extraordinary or violent contact* with the road bed or other surface of the earth, causing the upset, that there was no *collision*.

See also

Southern Casualty Co. vs. Johnson, 207 Pacific (Ariz.) 987.

We therefore, respectfully submit that the surface of the road must be deemed an *object* within the meaning of the collision clause of defendant's policy here under consideration.

II.

IS THE VIOLENT STRIKING OF THE CAR AGAINST THE EARTH, DUE TO ITS FORWARD MOTION UPON THE ROAD A "COLLISION" WITHIN THE MEANING OF THE COLLISION CLAUSE OF THE POLICY?

It can not be questioned but that there was a "collision" here between plaintiff's automobile and the surface of the road, within the meaning of that term as defined by the lexicographers. A collision is the "meeting and mutual striking or clashing of two or more moving bodies, or of a moving body with a stationery one."

Century Dictionary.

"A striking together; violent contact."

Standard Dictionary.

The definitions given by the courts are substantially similar to the definitions of the lexicographers.

"Collision is defined to be a dashing or violently running together. In maritime law "collision" is the act of ships or vessels striking together."

7 Cyc. 302.

"The term "collision" is derived from the Latin "collisio, collidere," to dash together, and may be defined generally as the act of colliding, and dashing or violently running together; injuries from one thing being rubbed or pressed against another; a striking against, as where the object struck is a brick, stone, or other solid substance; a striking together; a striking together or an impact of two bodies, vehicles, or vessels, more commonly the latter; violent contact."

11 C. J. 1011.

"A policy insuring automobiles from damage from the "collisions" of such automobiles with other vehi-

cles or objects means, by the word "collisions" cases of "striking against", vehicles or objects not in motion."

Pope, Legal Definitions, Vol. 1.

In accordance with the definitions above quoted, the courts have generally held that any violent contact between the automobile and another object is a collision within the meaning of that term as used in a collision clause of an insurance policy.

Harris vs. American Casualty Co. 83 N. J. Law, 641, 44 L.R.A. (N.S.) 70, 85 Atlantic 194, Ann. Cas. 1914B, 846.

Universal Service Co. vs. American Insurance Co. 181 N.W. (Mich.) 1007, 14 A.L.R. 183.

Wetherhill vs. Williamsburgh City Fire Insurance Co., 60 Pa. Super. Ct., 37.

Rouse vs. St. Paul F. & M. Insurance Co., 203 Mo. App. 963, 219 S.W. 688.

Sticks vs. Traveler's Indemnity Co., 175 Mo. App. 171, 157 S.W. 870.

Hanvey vs. Georgia L. Insurance Co., 141 Ga. 389, 81 S. E. 206.

Lepman vs. Employ Liability Assurance Corporation, 170 Ill. App. 379.

There is, however, a line of cases which have given a more restricted definition to the word "collision."

Bell vs. American Insurance, Co., 181 N.W. (Wis.) 733., 14 A.L.R. 179.

Moblad vs. Western Indemnity Co., 200 Pac. (Cal. App.) 750.

Hardenburg vs. Employer's Liability Insurance Co., 80 Misc. 522, 141 N. Y. Supp. 502.

The decisions in the cases last mentioned rest upon the argument that the incident causing the damage to the automobile in those cases was spoken of in common

parlance as an "upset" or "tipover"; that there was no violent contact with any object causing the "upset"; and that if it were the purpose to insure against damage resulting from such accident, such words as "upset" and "tip-over", would have been used. It should be noted that in each of these cases, the damage to the car was not in any manner due to violent resistance to its forward motion, or impact or violent contact resulting from forward motion, as is the fact in the case at bar.

It is stipulated here:

"That while plaintiff was driving the said automobile upon (43) the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle and frame of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; *that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and over turn and that the damage resulted therefrom; that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken.*"

(Record pp 55-56).

It should be noted that the damage to the car resulted from the violent impact and resistance to the forward motion of the car upon the road. So far as the contact between car and object is concerned, it is exactly the same in its nature as if the front axle had struck a protruding stone, the stump of a tree, embank-

ment, or other object sufficiently high to come in contact with the axle, and resist its forward motion. In other words, the collision here is due to a violent resistance to the forward motion of the car, while it was in an upright position.

The case is clearly distinguished from the decisions relied upon by the plaintiff in error, in that in none of these cases was there any violent contact with the earth prior to the tip-over or upset.

In *Bell vs. American Insurance Company*, 181 N. W. 733, after the driver had practically stopped the car, the wheels of the car settled into the soft ground on the side of the road, and the car tipped over as a result of such settling. There was no violent contact with the earth or any other object prior to, or causing, the tip-over. The court held that this was not a collision.

In *Moblad vs. The Western Indemnity Company*, the driver of the car swerved to the outer edge of the roadway; the roadway bank gave way, causing the automobile to run down an embankment, and after leaving the roadway to over turn and roll down the side of a mountain. The automobile did not strike or collide with any object upon the embankment or mountain side or roadway prior to the time that it over turned. The court held that this was not a collision.

The reasoning in these cases is expressly disapproved by the Supreme Court of Michigan in *Universal Service Company vs. American Insurance Company*, 181 N. W. 1007, 14 A.L.R. 183, and the broader meaning of the term "collision" was adopted as the

correct interpretation. We think that the better reason supports the conclusion of the Supreme Court of Michigan in the case last cited. But we call attention to the fact that in neither the Bell case nor the Moblad case was there any violent contact between the automobile and the earth prior to the upset or tip over; whereas in the case at bar, it is the violent contact of the front end of the car with the earth and the earth's resistance to its forward motion that causes the damage to the car, while it is yet upright on the road. The upset in the case at bar, is, itself, the result of the collision; but the *damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met, when it thus came in contact with the earth after the breaking of the axle.*" For this reason the decisions in the cases of Bell vs. American Insurance Company and Moblad vs. Western Indemnity Company are not in point. This distinction is pointed out by the Supreme Court of Arizona, in Southern Casualty Company vs. Johnson, 207 Pacific 987, from which we quote the following:

"However, an upset or tip-over resulting in damage may itself be caused by a collision, and, where this is true, the insurer is just as liable under an "accidental collision policy", as though the damage had resulted directly from the collision, because the injury to the car is as much due to the collision, though indirectly, as if the upset had not occurred. Even in those policies containing a provision excluding damage resulting from collision, due wholly to or in part to upsets, a recovery cannot be defeated where the upset is the result of a collision. 14 R. C. M. 1274, Harris vs. American Casualty Co., 83 N. J. Law, 641, 85 Atl. 194, 44 L. R. A. (N.S.) 70,

Ann. Cas. 1914 B, 846. Such a "policy does not mean that where a collision has first taken place there can be no recovery because as the result of the collision the machine is upset." Babbitt on Motor Vehicles "2d Ed. Par. 788; Universal Service Company vs. American Insurancy Co., 213 Mich. 523, 181 N. W. 1007, 14 A.L.R. 183."

207 Pacific 987.

In the case last cited, the trial court having found that the car "ran into the embankment" and therefore, that "the automobile accidentally collided with an embankment of the earth" and thereby caused the upset, the judgment in favor of the insured was affirmed.

Since it is agreed in the present case that "*the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it came in contact with the earth after the breaking of the axle,*" the whole argument of plaintiff in error that the damage herein was due to upset is without any basis in the facts. This car was damaged and wrecked while it was yet in an upright position. It does not appear that any substantial part of the damage, was due to, or occurred after the car overturned. If the case is not one of collision, what is it? It certainly is not a case where the damage is due to upset, because the damage to the car was done before the upset occurred. It is not even a case of damage resulting from upset, after collision, of the character considered by the court in Southern Casualty Company vs. Johnson, Supra. No substantial part of the damage to this car occurred after the overturn.

Attention is also called to the fact that it is now, and

at the time of the issuance of the policy in question was, the practice of the insurance companies to expressly exclude, from the protection of the policy, damage due to collision with the road bed where such was the intention of the insurer.

Rouse vs. St. Paul F. & M. Insurance Co.,
Supra., Stix vs. Traveler's Indemnity Co.,
175 Mo. App. 603, 219 S. W. 688. Harden-
burg vs. Employer's Liability Assurance
Company, 138 N. Y. Supp. 662; Gibson vs.
Georgia L. Insurance Co., 17 Ga. App. 43,
86 S. E. 335; Harvey vs. G. L. Insurance
Co., 141 Ga. 289, 81 S. E. 206.

Likewise it was the practice of insurance companies to exclude, from the risks of the policy, damage due to upsets, where such was the intention of the insurer.

Harris vs. American Casualty Co., Supra.,
Stuht vs U. S. F. & G. Co., 154 Pac.
(Wash.) 137, Lepman vs. Employer's Li-
ability Assurance Corporation, 170 Ill. App.
379.

It must be assumed that the insurer and its counsel were aware of this practice; and that, if it was their intention to exclude such risks from the policy; an express provision excluding liability for such damage would have been inserted in the policy. Failure to insert such express provision indicates that there was no intention to exclude such risks.

While the plaintiff in error did not insert in this policy any provision expressly excluding damage due to collision with the surface of the road bed; it did, insert an express provision "excluding loss or damage to any tire due to puncture, cut, gash, blowout or other

ordinary tire trouble." This clause is important for two reasons:

First. It indicates the understanding of the insurer that in the absence of such a clause ordinary tire, cuts, gashes, blowouts and other ordinary tire trouble would be within the risks insured against.

Second. The insurer's *express* exclusion of damage due to the *ordinary* contact of the automobile with the road, indicates its intention that all damage due to *extraordinary* and *violent* contact with the road, not expressly excluded, should be within the protection of the policy. To hold otherwise would do violence to the ordinary rules of construction applicable to contracts.

Expressio unius est exclusio alterius.

III.

THE COLLISION, BEING THE IMMEDIATE CAUSE OF THE DAMAGE TO THE AUTOMOBILE, CAN THE INSURER AVOID LIABILITY BY MERELY SHOWING THAT THE COLLISION WAS CAUSED BY THE BREAKING OF THE AXLE?

The collision here was caused by the breaking of the axle. In this respect it does not differ from other collisions. Necessarily all collisions, as well as all other things that happen in this universe, must have a cause. Ordinarily the cause of a collision is due to some defect either in the car, or in the road, or the careless or willful act or omission of some person; and in every such case it can be said that such defect

or act or omission was the proximate cause of the damage. If this policy insures only against damage resulting from collisions which are not caused by something else, then it does not, in fact, insure against any thing. We repeat, all collisions are *caused* by something. Necessarily that something is so closely related to the damage that it can be said to be the proximate cause thereof. If the insurer can escape liability merely by showing that the collision was caused by defective mechanism, a defective road bed, the careless or willful act of a third person, or unavoidable accident, then a policy of insurance against damage resulting from collision is a pure delusion. If this be the correct construction of the policy, then the only collisions insured against are those which occur without a cause. There are no such collisions.

This collision was caused by the breaking of the axle. But suppose that it was the steering gear that was defective and as a result thereof, the car became unmanageable, and run into a telegraph pole. In such case the insurer would claim non-liability upon the ground that the collision was caused by the defect in the steering gear. It could do so with just as good grace as it now claims non-liability upon the ground that the collision was due to the breaking of the axle. If while the defendant in error was driving the car upon the public highway, another automobile was recklessly driven into him, the defendant in error would claim that the act of the driver in the other car had caused the collision, and was the proximate cause of the damage. In other words, collisions never occur

without a cause; and necessarily the cause of the collision is so closely related to the damage resulting from the collision, that it can be said to be the proximate cause of such damage.

The policy of insurance, however, "covers..... damage to the automobile by being in accidental collision." It therefore, covers all damage resulting from accidental collision, of every character, and howsoever caused, except as otherwise expressly provided. It does not exclude damage in cases where the collision was caused by breaking of the mechanism or otherwise. It simply covers all "damage to the automobile by being in accidental collision with any object." The plain reading of the policy therefore, forbids the claim of non-liability upon the ground that the collision was caused by the breaking of the axle.

It is not claimed by the plaintiff in error that any other person is responsible for the breaking of the axle, or for the damage resulting from the collision thereby brought about. Most collisions can be ascribed to either the negligence or willful misconduct of someone. In any such case, the owner of the car would have a right of action against the party whose misconduct brought about the collision, and the resulting damage. But this collision differs from the majority of cases, in that no negligence or willful misconduct on the part of any person is shown. Plaintiff, therefore, so far as shown by the facts in this case, has no recovery against any third person. Unless he is

indemnified by the collision clause of the policy, he must, himself, bear the loss resulting from the collision; and take his consolation in the knowledge that since the collision had a cause the insurer is not responsible. Attention is called to the following clause in the policy:

“If this company shall claim that the loss or damage was *caused* by the act or neglect of any person or corporation, private or municipal, this company shall, on payment of the loss, be subrogated to the extent of such payment to all right of recovery by the assured for the loss resulting therefrom, and such right shall be assigned to this company by the assured for the loss resulting therefrom, and such right shall be assigned to this company by the assured on receiving such payment.”

(Record P. 15.)

This clause can have application only in cases where the “act or neglect” of the party is the proximate cause of the damage. Obviously, the assured could never have a right of recovery against “any person or corporation” unless such act or neglect was the proximate *cause* of the damage to the car. If therefore, there is no liability on the part of the insurer in any case where the act or neglect of a third party in bringing about the collision, is the proximate cause of the damage, the above clause in the policy would have no meaning. It can apply only in cases where the act of some third party was the *proximate* cause of the damage. This clause points out the remedy of the insurer in the case at bar. It should pay the damage resulting from the collision and be subrogated to the right of

the insured, if any he has, to recover from the person whose act or neglect caused the collision.

Of course if the policy had excepted from the risks insured against, damage due to the breaking of the axle, there would be no liability here even though the *breaking* of the axle resulted in a collision which in turn caused the damage. Such is the rule declared by the Montana Statute.

“Where a peril is *specially excepted* in a contract of insurance, a loss, which would not have occurred but for such peril, is thereby excepted; although the immediate cause of the loss was a peril which was not excepted.”

Section 8140 R. C. M.

But the policy under consideration does not specially except from the risks insured against, damage due to the breaking of the axle or any other parts of the mechanism.

The Montana Statute further provides that the *negligence* of the assured or *others* causing the loss, shall not exonerate the insurer.

“An insurer is not liable for a loss caused by the willful act of the insured; but he is not exonerated by the negligence of the insured, or of his agents or others.”

Section 8141 R. C. M.

It therefore follows that under the express provision of the statute even if the collision were chargeable to the negligence of the manufacturer of the car, and the defendant in error had a right of action against the manufacturer for such negligence on the ground that the same was the proximate cause of the collision and

damage to the car, such fact would not exonerate the insurer nor relieve it from liability. Its remedy is to pay the loss and be subrogated to the assured's right of action. Such is also the express provision of the policy above quoted.

The cases cited by plaintiff in error on pages 20 to 27 of its brief have no application to the case at bar. The decisions in these cases are mere discussions and application of the rule "cause proxima, non remota, spectatur." Certainly the learned counsel for the plaintiff in error would not claim that the collision here was the *remote* cause of the damage. It is more immediately connected with the damage than is the breaking of the axle. These general discussions therefore of *proximate* causes as distinguished from the *remote* causes are *wholly inapplicable to this case*.

We, therefore, respectfully submit that there was no error committed by the court herein and that the judgment of the trial court should be affirmed.

JOSEPH P. DONNELLY
LOUIS P. DONOVAN

Attorneys for Defendant in Error.

United States
Circuit Court of Appeals

For the Ninth Circuit.

JOHN TUPPELA, J. H. COBB, as Trustee for
JOHN TUPPELA, and GROVER C.
WINN, as Guardian of the Person of JOHN
TUPPELA,

Plaintiffs in Error,

vs.

ENOCH E. MATHISON,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District
Court of the District of Alaska, Division No. 1.

FILED

FEB 14 1923

F. D. MONCKTON,

CLERK

United States
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JOHN TUPPELA, J. H. COBB, as Trustee for
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

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In the United States District Court for the Dis-
trict of Alaska, Division No. 1, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB, as Trustee for
JOHN TUPPELA, and GROVER C.
WINN, as Guardian of the Person of JOHN
TUPPELA,

Defendants.

Complaint.

Comes now the plaintiff in the above-entitled
court and cause, and, for his first and separate cause
of action, complains of the defendants herein, and
alleges:

I.

That heretofore, and at all times material herein,
and on or about the 11th day of March, 1918, the

plaintiff was and still is an attorney and counsellor at law, duly licensed and qualified to carry on the general practice of law, and having his office and general place of business in Astoria, Clatsop County, Oregon.

II.

That heretofore, and on or about the 19th day of August, 1920, by an instrument of writing the defendant Tuppela herein conveyed all of his right, title and interest in and to all of his property to J. H. Cobb, defendant herein, in trust, however, subject only to certain reservations enumerated in said writing. That by virtue of said trust agreement the said J. H. Cobb on or about said date became trustee of all the property and estate of the said defendant Tuppela, and ever since said date and now is acting as said trustee. That said trust agreement was so drawn, witnessed and acknowledged as to [1*] entitle the same to be recorded, and the same was thereafter recorded on the 21st day of August, 1920, in the Record of Deeds, Book 3, page 420, of the records of the Recording District of Sitka (No. 4) Division No. 1, District of Alaska.

III.

That heretofore, and on or about the 28th day of July, 1921, by an order duly and regularly made in the United States Commissioner's Court, which is *ex officio* the Probate Court for the Territory of Alaska, Division No. 1, Precinct of Juneau, the said John Tuppela was pronounced to be an insane

*Page-number appearing at foot of page of original certified Transcript of Record.

person and incapable of taking care of himself or of moneys paid to him for his support, and on said date Grover C. Winn was by an order of said Court duly appointed as guardian of the person of said John Tuppela, and ever since said date and now the said Grover C. Winn has been and is duly acting as such guardian.

IV.

That a contract was entered into on or about the 11th day of March, 1918, by and between the plaintiff and defendant Tuppela herein, parties herein, wherein and whereby the said defendant engaged, retained and employed the plaintiff as an attorney at law to prosecute to final determination certain claims that Tuppela had in and to the following described properties: that is to say, the "Over the Hill," "Pacific," "Golden West," "Rising Sun," and "Porphyry" lode mining claims located at or near Chichagoff, in the Sitka Recording Precinct, Territory of Alaska.

That it was stipulated in said contract that the title of said defendant to said claims was in dispute, as well as the right of said defendant to the earnings produced from the development of certain of said properties. It was further stipulated in said contract that plaintiff was to have the exclusive right to prosecute said claims; that he was to exercise his own best judgment in all matters pertaining [2] to the prosecution of said claims, and if he deemed it necessary, was to have the right to select such an attorney or attorneys as

he deemed suitable as assistants in said proceedings.

In consideration of said services and covenants undertaken by said plaintiff, it was agreed by said defendant in said contract that plaintiff was to receive one-half of all property recovered in said proceeding, or in case of sale thereof then one-half of the proceeds of said sale, and in the event that any damages should be recovered against any parties holding said property adversely to said defendant, then the plaintiff was to receive one-half of any such damages.

Said contract was so witnessed, acknowledged, executed and delivered as to entitle the same to be recorded, and the same was thereafter on the 27th day of August, 1921, recorded in Deeds, Record Book No. 4, pages 116, 117, of the records of the Recording District of Sitka (No. 4) Division No. 1, District of Alaska.

V.

Upon the execution of said contract said plaintiff commenced work pursuant to the terms thereof, and diligently and skillfully ascertained as far as possible all of the facts deemed material by him to the proper prosecution of said claims. That for a period of over five (5) months plaintiff was in frequent consultation with said defendant and others who had knowledge of certain facts pertaining to the matter in controversy, and during said period plaintiff carefully, diligently and skillfully examined all of the legal principles, statutes and court decisions which had a bearing on the facts in

said cause, for the purpose of successfully establishing and recovering by suit, or otherwise, said defendant's interests and rights in and to said properties.

VI.

That in the course of said investigation it developed and came to the attention of plaintiff that there were certain witnesses and [3] private documents, known to Tuppela to be in Alaska, that were of paramount importance for the proper prosecution of said claims. That in the execution of said contract it was contemplated by the respective parties, and implied in the terms thereof, that said defendant would furnish all of the information possible, and all papers and documents in his possession or that he might be able to obtain and which might be required of him by plaintiff in the proper preparation and prosecution of said claims. That plaintiff contemplated the institution of legal proceedings against the Chichagoff Mining Co., a corporation, for the recovery of the said defendant's interests in said properties and all moneys due said defendant because of the withholding from said defendant and depriving him thereof and because of the development of the same, and that it was mutually agreed between plaintiff and said defendant that said defendant would go to Alaska as soon as possible to obtain an interview with certain important witnesses and procure certain letters and documents which were important to be had at that time.

VII.

Thereafter, and in pursuance of said agreement with plaintiff, said defendant left said Astoria on or about the — day of September, 1918, for the purpose of going to Juneau, Alaska, getting the information, documents and letters required, and returning to Astoria at the earliest date possible.

VIII.

That ever since said date plaintiff has never heard directly from said defendant, and said defendant never thereafter communicated with plaintiff, nor furnished him with said information, letters or documents. That because of the action of said defendant in the respect just noted the said defendant breached his covenants under said contract, and by his action discharged plaintiff, and [4] and prevented and made it impossible for the plaintiff to do anything further toward prosecuting said claims or otherwise carrying out the covenants of said contract. That at all times material herein the said plaintiff was ready, able and willing to proceed with, and to diligently and faithfully carry out the covenants made by him in said contract, and offered Tuppela his services at all times in conformity with the terms of said contract.

IX.

That pursuant to the terms of said contract and at said Tuppela's request plaintiff employed a large portion of his time during said five months in working for said defendant, and was thereby prevented from attending to a large portion of his other cases

and general office business; that said plaintiff spent his time and money on behalf of said defendant, and assumed the responsibility of a large and difficult legal proceeding. That because of said contract said plaintiff was prevented from being employed as an attorney for any other party in the prosecution of said claims, and was prevented from seeking employment from others in the prosecution of said claims. That because of said labor, time and responsibility, under the terms of said contract there became due and owing plaintiff by said defendant at the time of the breach of said contract, as herein alleged, a reasonable sum of money as compensation for such services, time and responsibility, and that the said plaintiff now alleges that the sum of \$150,000.00 is a reasonable sum to be allowed him as compensation.

X.

That all of said claims described herein, and with respect to which said contract was entered, as alleged, between plaintiff and said defendant, both as to the mining properties and claims, and as to the earnings thereof, were on the date of said contract justly owned by and due to said defendant, and were enforceable, recoverable [5] and collectible on said date.

XI.

That said defendant on or about the — day of September, 1918, in violation of his covenants in said contract, engaged, employed and retained other attorneys and proceeded with the prosecution of his said claims to the properties and rights therein

described in paragraph IV of this complaint and described in said contract, and as a result of said action on the part of said defendant, judgment and decree was thereafter entered in the United States Court of Appeals for the Ninth Circuit, on or about the 20th day of July, 1920, in that cause wherein John Tuppela, defendant herein, was plaintiff, and the Chichagoff Mining Co., a corporation, was defendant. That by the terms of said decree said defendant recovered a one-half interest in the "Over the Hill" and "Pacific" lode mining claims, together with the whole of the "Rising Sun" lode mining claim. Said decree further provided for a conveyance to be made by the said Chichagoff Mining Co. to said defendant in accordance with said decree, and that an accounting be rendered by the Chichagoff Mining Co. of all ores extracted from said mines, and that after deducting operating expenses in the extraction of said ores a judgment be rendered on said accounting in favor of said defendant for the value of said ore as his interest may appear in the property from which the ore was taken. Said decree further provided that said defendant recover his costs in said proceeding.

XII.

That pursuant to said decree a settlement was had between said defendant Tuppela and the Chichagoff Mining Co., and under the terms of said settlement it was stipulated between the respective parties that said mining properties were worth, and plaintiff alleges that they were worth not less than, \$1,200,000.00; that Tuppela should receive

\$300,000.00 cash as his share of the net earnings thereof, and \$—— cash as his costs in said legal proceeding. That in accordance with [6] the terms of said settlement said defendant received conveyances to a one-half interest in said “Over the Hill” and “Pacific” lode mining claims and to the whole of the “Rising Sun” lode mining claim and also received \$300,000.00 cash, plus \$—— cash, costs of said legal proceeding, and that said Tuppela ever since said date and now is the owner of said property and money, of which said defendant Cobb is now the trustee under said trusteeship agreement with said Tuppela.

XIII.

That the claims prosecuted to a successful determination as described in paragraph XII above are the identical claims described in said contract between plaintiff and said defendant, and the properties and subject matter of the suit and decree entered thereon as described in said paragraph XII are the same as those set forth in said contract.

XIV.

That plaintiff has made demand upon said defendant for the payment of the reasonable value of his services as described herein but that said defendant has failed, neglected and refused to pay the plaintiff, and plaintiff has received nothing for said services.

Plaintiff for his second, further and separate cause of action complains of the defendants, and for cause of action alleges:

I.

That heretofore, and at all times material herein, and on or about the 11th day of March, 1918, the plaintiff was and still is an attorney and counsellor at law, duly licensed and qualified to carry on the general practice of law, and having his office and general place of business in Astoria, Clatsop County, Oregon.

II.

That heretofore, and on or about the 19th day of August, 1920, by an instrument of writing the defendant Tuppela herein conveyed all of his right, title and interest in and to all of his property to J. H. Cobb, defendant herein, in trust, however, subject only to [7] certain reservations enumerated in said writing. That by virtue of said trust agreement the said J. H. Cobb on or about said date became trustee of all the property and estate of the said defendant Tuppela, and ever since said date and now is acting as said trustee. That said trust agreement was so drawn, witnessed and acknowledged as to entitle the same to be recorded, and the same was thereafter recorded on the 21st day of August, 1920, in the Record of Deeds, Book 3, page 420, of the records of the Recording District of Sitka (No. 4) Division No. 1, District of Alaska.

III.

That heretofore, and on or about the 28th day of July, 1921, by an order duly and regularly made in the United States Commissioner's Court, which is *ex officio* the Probate Court for the Territory

of Alaska, Division No. 1, Precinct of Juneau, the said John Tuppela was pronounced to be an insane person and incapable of taking care of himself or of moneys paid to him for his support, and on said date Grover C. Winn was by an order of said Court duly appointed as guardian of the person of said John Tuppela, and ever since said date and now the said Grover C. Winn has been and is duly acting as such guardian.

IV.

That on or about the 11th day of March, 1918, John Tuppela, defendant herein, entered into a contract with said plaintiff wherein and whereby said defendant engaged, employed and retained said plaintiff as an attorney at law for the purpose of taking any necessary proceedings for the recovery of certain mining properties and money which said defendant claimed to own, which had been wrongfully taken from him; that said properties were described in said contract as follows, to wit: "Over the Hill," "Pacific," "Golden West," "Rising Sun," and the "Porphyry" lode mining claims, all located at Chichagoff, in the Sitka Recording Precinct of the Territory of Alaska. It was further set forth in said contract [8] that the title to said property and other properties of said defendant was in dispute, and that said plaintiff was thereby employed as an attorney at law to act for the said defendant and in his stead in all matters pertaining to the prosecution of the claims of said defendant set out in said contract.

That said plaintiff as such attorney was to act for said defendant in all courts in which it may be deemed necessary to prosecute said claims, to the end that a complete adjustment and settlement be made of all said claims; that said contract further provided that said plaintiff was to have the exclusive right to prosecute said claims and was to use his best judgment in the time and manner of such prosecution.

In consideration of such action and services of the plaintiff said contract provided that plaintiff was to receive as his pay, one-half of the interest recovered by said defendant in and to the properties described herein and described in said contract, or in case of a sale of said properties plaintiff was to receive one-half of the proceeds of such sale. It was further provided in said contract that in the event that any damages should be recovered by said defendant from any parties claiming an interest in said property adverse to said defendant that said defendant should pay plaintiff one-half of any such money damages collected.

Said contract further provided that plaintiff was to have exclusive control of the prosecution of all such claims to such properties on behalf of said defendant, and was to exercise his best judgment in the protection and assertion of the claims of said defendant; that said plaintiff was to have the exclusive right to collect all moneys due said defendant upon said claims, and was to have the right to employ associate attorneys in case plaintiff should wish for an assistant; that said contract was wit-

nessed, acknowledged and delivered in such a manner as to entitle the same to be recorded, and the same was thereafter [9] recorded on the 27th day of August, 1917, in Deeds Record Book No. 4, pages 116-117 of the Records of the Recording District of Sitka (No. 4), Division No. 1, District of Alaska.

V.

That pursuant to the terms of said contract said plaintiff faithfully and diligently performed each and all of the covenants therein contained and undertaken therein by said plaintiff; that plaintiff made thorough investigation of the facts in respect to said claims and the law applicable thereto, and during a period of five months plaintiff labored in said cause and devoted a large portion of said time to the preparation of said cause under the terms of said contract; that because of said contract the plaintiff was bound to carry on the prosecution of said claims on behalf of said defendant, and was thereby prevented from acting as an attorney for any of the other parties in the matter of the prosecution of said claims. That because of the fact that the plaintiff was a party to said contract with said defendants said plaintiff was compelled to neglect and did actually neglect the other business which said plaintiff had in his said law office during said period of time, and was prevented from devoting his time to the prosecution of other business, and was compelled to remain at his said office during said period of time, holding himself in readiness at all times to carry on the work called

for in said contract to be performed by said plaintiff.

VI.

That on or about the —— day of September, 1918, the said defendant without just or legal cause, and without any sufficient reason therefor, breached said contract and discharged plaintiff from further control or participation in the prosecution of said claims and in violation of the terms of said contract; that plaintiff had at all times diligently and faithfully carried out the work under said [10] contract contracted to be performed by him, and that the plaintiff was at all times material therein, ready, able and willing to proceed with the prosecution of said claims, and to fulfill his covenants under said contract, and offered said defendant his services under said contract but that said defendant refused said services without legal or sufficient cause for said refusal, and discharged plaintiff, and thereby rendered the performance of said contract on the part of the plaintiff according to the terms thereof, impossible.

VII.

That defendant on or about the —— day of September, 1918, in violation of his covenants in said contract, engaged, employed and retained other attorneys, and proceeded with the prosecution of his said claims to the properties described in paragraph IV herein, and described in said contract, and as a result of said action on the part of said defendant a judgment and decree was thereafter entered in the United States Circuit

Court of Appeals for the Ninth Circuit, on or about the 20th day of July, 1920, in that cause wherein John Tuppela, defendant herein, was plaintiff, and the Chichagoff Mining Co., a corporation, was defendant, and by the terms of said decree said defendant recovered a one-half interest in the "Over the Hill" and "Pacific" lode mining claims, together with the whole of the "Rising Sun" lode mining claim. Said decree further provided that a conveyance be made of said properties by the said Chichagoff Mining Co. to said defendant; that an accounting be had of all ores extracted by said Chichagoff Mining Co. for said mines, and that a judgment be entered in favor of said defendant Tuppela according to his interest in said properties, for the value of said ores, as described in said decree, first deducting the cost of mining and extracting said ores. And said decree further provided that said Tuppela recover his costs in said proceeding. [11]

VIII.

That pursuant to said decree a settlement was had between said Tuppela and said Chichagoff Mining Co., and under the terms of said settlement it was stipulated between the respective parties that said mining properties were worth, and plaintiff alleges that they were worth not less than, \$1,200,000.00, and that said Tuppela should receive \$300,000.00 cash as his share of the earnings thereof, and \$—— cash as his costs in the legal proceedings; that in accordance with the terms of said settlement said Tuppela received conveyances

to a one-half interest in said "Over the Hill" and "Pacific" lode mining claims, and to whole of the "Rising Sun," and also received \$300,000.00 in cash, plus \$—— cash, costs of said legal proceedings.

IX.

That the "Over the Hill," "Pacific," and "Rising Sun" lode mining claims described in the decree hereinabove referred to, and that the claims prosecuted by John Tuppela, defendant herein, in the case of John Tuppela, plaintiff, vs. Chichagoff Mining Co., defendant, referred to above, were the same properties and the same claims described in the contract between plaintiff and said Tuppela hereinabove referred to, and that said claims at the time of the execution of said contract were capable of being enforced, and that the moneys due said defendant from said properties on said date were collectible. That the very matters contained in said contract were the very same matters, the very same claims, and the very same property, interests and rights which said defendant asserted, presented and gained through the legal proceedings instituted against said Chichagoff Mining Co., as hereinabove described.

X.

That the services rendered said defendant by the plaintiff herein were and are of great value to said defendant, and that the said [12] contract entered into on the 11th day of March, 1918, by the said defendant and plaintiff was a contract of great value to the plaintiff, and that the breach

of said contract on the part of said defendant in the manner set forth in this part of the complaint caused great damage to the plaintiff as he now alleges in the sum of \$450,000.00; that but for said breach of contract said plaintiff would have successfully prosecuted said claims and would have earned, received and realized from said contract the said sum of \$450,000.00 but that through the breach of said contract as herein alleged said plaintiff was deprived wholly of said sum which otherwise he would have earned, received and realized, and that he has received nothing under the terms of said contract.

For a third, further and separate cause the plaintiff complains of the defendants, and for cause of action alleges:

I.

That heretofore, and at all times material herein, and on or about the 11th day of March, 1918, the plaintiff was and still is an attorney and counsellor at law, duly licensed and qualified to carry on the general practice of law, and having his office and general place of business in Astoria, Clatsop County, Oregon.

II.

That heretofore, and on or about the 19th day of August, 1920, by an instrument of writing the defendant Tuppela herein conveyed all of his right, title and interest in and to all of his property to J. H. Cobb, defendant herein, in trust, however, subject only to certain reservations enumerated in said writing. That by virtue of said trust agree-

ment the said J. H. Cobb on or about said date became trustee of all the property and estate of the said defendant Tuppela, and ever since said date and now is [13] acting as said trustee. That said trust agreement was so drawn, witnessed and acknowledged as to entitle the same to be recorded, and the same was thereafter recorded on the 21st day of August, 1920, in the Record of Deeds, Book 3, page 420, of the records of the Recording District of Sitka (No. 4), Division No. 1, District of Alaska.

III

That heretofore, and on or about the 28th day of July, 1921, by an order duly and regularly made in the United States Commissioner's Court which is *ex officio* the Probate Court for the Territory of Alaska, Division No. 1, Precinct of Juneau, the said John Tuppela was pronounced to be an insane person and incapable of taking care of himself or of moneys paid to him for his support, and on said date Grover C. Winn was by an order of said Court duly appointed as guardian of the person of said John Tuppela, and ever since said date and now the said Grover C. Winn has been and is duly acting as such guardian.

IV.

That heretofore, and between the 11th day of March, 1918, and the 30th day of August, 1918, at the special instance and request of defendant, John Tuppela, the plaintiff advanced and loaned to defendant certain sums of money aggregating \$362.50, an itemized statement of which is hereto attached,

made a part hereof, and marked Plaintiff's Exhibit "A."

V.

That defendant promised and agreed to repay plaintiff said sum of \$362.50 within a reasonable time thereafter but that defendant has failed, neglected and refused to pay said sum or any part thereof to plaintiff although demand has been made on said defendant by plaintiff for payment of the same, and the full sum of \$362.50 is at this time due plaintiff. [14]

WHEREFORE, plaintiff prays for judgment against John Tuppela, defendant herein, and against the other defendants in their respective capacities in the following respect:

1. For the sum of \$150,000.00 with interest thereon from and after October 1st, 1918, at 8% per annum, as in accordance with the allegations of the first and separate cause of action herein.

2. For the sum of \$450,000.00 in accordance with the allegations of the second, further and separate cause of action herein.

3. For the sum of \$362.50 in accordance with the allegations of the third, further and separate cause of action herein, with interest thereon from October 1, 1918, at 8% per annum.

4. For cost and disbursements in this action.

MATHISON & MANNIX,
By JOSEPH MANNIX,
R. E. ROBERTSON,
Attorneys for Plaintiff. [15]

Exhibit "A."**JOHN TUPPELA**

to

ENOCH E. MATHISON, Dr.

To money loaned:

1918

March	11	.....	\$ 8.00
	18	.....	8.25
	23	.....	12.00
	30	.....	10.00
April	12	.....	10.00
	16	.....	5.00
	22	.....	15.00
	30	.....	12.00
May	6	.....	5.00
	11	.....	6.00
	15	.....	2.25
	18	.....	12.00
	22	.....	8.00
	30	.....	10.00
June	5	.....	15.00
	10	.....	10.00
	15	.....	15.00
	18	.....	3.00
	25	.....	15.00
	29	.....	5.00
July	3	.....	10.00
	6	.....	60.00
	17	.....	8.00
	19	.....	5.00
	22	.....	10.00
	27	.....	15.00

1918.

Aug.	7	10.00
	12	10.00
	16	15.00
	20	8.00
		25.00
		<hr/>
		\$362.50

Filed in the District Court, District of Alaska,
First Division. Oct. 13, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [16]

State of Oregon,
County of Clatsop,—ss.

I, Enoch E. Mathison being first duly sworn, says:
That I am the plaintiff in the above-entitled cause,
and that the facts stated in the foregoing complaint
are true, as I verily believe.

ENOCH E. MATHISON.

Subscribed and sworn to before me this 3d day
of Oct., 1921.

[Notary Seal]

JOSEPH MANNIX,
Notary Public for Oregon.

My commission expires Nov. 2, 1923.

Filed in the District Court, District of Alaska,
First Division. Oct. 13, 1921. J. W. Bell, Clerk.
By V. F. Pugh, Deputy. [17]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB, as Trustee for
JOHN TUPPELA, and GROVER C.
WINN, as Guardian of the Person of JOHN
TUPPELA,

Defendants.

Second Amended Answer.

Leave of the Court first being had, defendants amend their amended answer herein so that the same shall hereafter read as follows:

Now come the defendant John Tuppela by his guardian *ad litem*, and the defendants John H. Cobb, as trustee for John Tuppela, and Grover C. Winn, as guardian of the person of John Tuppela, by their attorneys, and, answering the complaint of the plaintiff herein, deny and allege as follows:

Referring to paragraph I of the first and separate cause of action in said complaint contained, these defendants have no knowledge or information as to the matters therein alleged and they, therefore, deny the same.

Referring to the fourth paragraph of the said first cause of action, these defendants admit that a contract in writing between the plaintiff and the defendant John Tuppela was made on or about

the 11th day of March, 1918, but they deny that the contract alleged was the contract so made, and allege that the contract actually entered into was as thereinafter more particularly set out. [18]

Referring to paragraphs V and VI of said first cause of action, these defendants deny all and singular the allegations therein contained.

Referring to paragraph VII, these defendants admit that the defendant Tuppela left Astoria, Oregon, for the purpose of coming to Juneau on or about the 30th day of September, 1918, but they deny, all and singular, the other and further remaining allegations in said paragraph contained.

Referring to paragraph VIII, these defendants deny, all and singular, the allegations therein contained.

Referring to paragraph IX, these defendants deny, all and singular, the allegations therein contained.

Referring to paragraph XI, these defendants deny that the defendant Tuppela, on or about the — day of September, 1918, in violation of the covenants in said contract or otherwise, engaged, employed and retained other attorneys and proceeded with the prosecution of his said claims to the properties and rights therein described in paragraph IV of the complaint. They admit that the decree mentioned in said paragraph was duly entered by the United States Circuit Court of Appeals for the Ninth Circuit, as therein alleged, but they deny that the same was the result of any action taken by said Tuppela in September, 1918.

Referring to paragraph XII of said complaint, these defendants deny, all and singular, the allegations therein contained.

Referring to plaintiff's further and separate cause of action and to the first paragraph thereof, these defendants have no knowledge and information concerning the matters and things therein alleged, and, therefore, deny the same.

Referring to paragraph IV of said second cause of action, these defendants admit that a contract was made between the plaintiff and the defendant Tuppela on or about the 11th day of March, 1918, but [19] they deny that said contract is in terms and effect as alleged by the plaintiff, but the real contract is hereinafter more particularly set out.

Referring to paragraph V, these defendants deny, all and singular, the allegations therein contained.

Referring to paragraph VI, these defendants deny, all and singular, the allegations therein contained.

Referring to paragraph VII, these defendants deny that in September, 1918, in violation of the covenants of the contract alleged by the plaintiff, or otherwise, the defendant John Tuppela engaged, employed, and retained other attorneys, and proceeded with the prosecution of his claims to the properties described in paragraph IV of the complaint. They admit that the decree alleged was made by the United States Circuit Court of Appeals for the Ninth District, but deny that the same was made as the result of any action taken by the defendant John Tuppela in the month of September, 1918.

Referring to paragraph VIII, these defendants admit that a settlement was had pursuant to said decree between John Tuppela and the Chichagoff Mining Co., but deny that said settlement was in terms as alleged by the plaintiff, but the correct terms of said settlement are as follows, to wit: That on or about the 6th day of July, 1920, said defendant John Tuppela procured a decree for an undivided one-half interest in the "Over the Hill" lode mining claim, an undivided one-half interest in the "Pacific" lode mining claim, and the whole of the "Rising Sun" lode mining claim, and also a decree for an accounting of the ores mined and milled from said claims by the said Chichagoff Mining Co.; that thereafter a settlement was had in the matter of accounting, and the defendant John Tuppela received as his share of the same after paying his part of the expenses of said suit the sum of \$114,250.00 and an undivided one-quarter interest in the "Over the Hill" and "Pacific" lode mining claims and an undivided [20] one-half interest in the "Rising Sun" lode mining claim.

Referring to paragraph X, these defendants deny that the plaintiff rendered any services to the defendant John Tuppela, and deny that any services claimed to have been rendered were of any value whatsoever to said defendant; they further deny that the contract of the 11th day of March, 1918, between the plaintiff and the defendant Tuppela, was a contract of great or any value to the plaintiff and they deny that the plaintiff has suffered great or any damages whatsoever by reason

of the breach of said contract on the part of the defendant John Tuppela, and deny that there was any such breach. They further deny that the plaintiff would have successfully prosecuted the said Tuppela's claims, or would have earned, received, and realized from said contract the sum of \$450,000.00, or any other sum whatsoever. They further deny that through the breach of said contract, or otherwise, the plaintiff has been deprived of the sum of \$450,000.00, or any other sum whatsoever.

Referring to the third further and separate cause of action in plaintiff's complaint contained, and referring to the first paragraph thereof, these defendants have no knowledge or information concerning the matters and things therein alleged, and they, therefore, deny the same.

Referring to paragraphs IV and V of said third cause of action in said complaint, these defendants have no knowledge or information concerning the matters therein alleged and they, therefore, deny the same.

And for a first and affirmative defense to the matters and things in the plaintiff's complaint alleged, these defendants allege:

Plaintiff ought not to have and maintain this suit against them, for that:

Plaintiff was not at the time of the execution of the contract referred to in the complaint, and is not now, and never has been, qualified and capable of performing on his part the duties and [21] professional service therein undertaken by him, in

this: That it became and was the duty of the plaintiff under said contract, and it was in the contemplation of the parties thereto, that the plaintiff should bring an action in the name of John Tuppela against the Chichagoff Mining Co., to recover the property in said contract mentioned, that such a suit could only be brought in the District Court for Alaska, and plaintiff was not at the time of the execution of said contract, is not now, and never has been, admitted to practice in the courts of Alaska, and could not, at said time, become so qualified.

And for a second affirmative defense to the matters and things in said contract alleged, these defendants allege:

That if it be true as claimed by plaintiff that the defendant John Tuppela did discharge the plaintiff as his attorney, that said discharge was justified; for that plaintiff, by his gross negligence had failed, neglected and refused to bring the suit contemplated in said contract of employment for more than one year after the date of said contract of employment; or to come to Alaska and investigate the titles and rights of the said Tuppela thereunder; or in fact, to take any steps whatsoever toward a compliance with said contract on his part.

And for a third affirmative answer to the three causes of action in said complaint contained, these defendants allege:

That the plaintiff ought not to have and maintain this action, for that: The contract mentioned in plaintiff's complaint was obtained by plaintiff by

fraud and imposition practiced by the plaintiff upon the defendant John Tuppela as follows, to wit:

That the said Tuppela became insane in the early part of the year 1914, and was sent to the Morning-side Asylum for treatment; that he was discharged from said asylum on December 17, 1917; that some time about March 1, 1918, he met the plaintiff at Astoria, Oregon; that the plaintiff held himself out as an attorney at law; that said [22] Tuppela is an ignorant miner and prospector, unable to read or write the English language, and, in addition, was at said time in bad health mentally and physically, and was in utterly destitute circumstances, that all the property he owned was the mining property mentioned in the complaint, and which was then in the possession of the Chichagoff Mining Co., and claimed by it through alleged conveyance of Tuppela's title; that Tuppela at said time was desirous of finding an attorney who could and would undertake to provide the moneys to meet the necessary expenses of *bring* and prosecuting to final judgment a suit in his behalf against the said Chichagoff Mining Co., to recover said claims, and who could and would also, with reasonable skill and diligence as his attorney, bring and prosecute such suit to final judgment in consideration of a moiety after fruits of such litigation, the said Tuppela having no other means whatsoever of procuring such moneys and legal services; that Tuppela fully acquainted the plaintiff with his condition, and all the facts concerning his rights to said property, and the plaintiff then and there agreed on his part

to bring such suit for Tuppela and prosecute the same to final judgment with reasonable skill and furnish all moneys necessary for the expenses of the suit and for the support of Tuppela during the litigation, in consideration of an undivided one-half interest in such property in the event plaintiff should succeed in recovering the same for the said Tuppela. That after said agreement and understanding between the plaintiff and the said Tuppela had been reached, plaintiff, as Tuppela's attorney, undertook to reduce the same to writing for execution on the part of both, but in so doing plaintiff intentionally and fraudulently omitted from such writing the obligations on his part to furnish said moneys and to bring and prosecute said suit with reasonable skill and diligence, but falsely represented to the said Tuppela that the contract as drawn by plaintiff correctly embodied their agreement as aforesaid, and the said Tuppela being unable to read said writing, [23] and relying upon the said representations of plaintiff, signed the same believing it to contain the stipulations and undertakings of the plaintiff aforesaid, and the said pretended contract, a copy of which is hereto attached, is the identical contract mentioned in the complaint.

And for a fourth affirmative defense to the three causes of action in said complaint, defendants allege:

That after the employment of plaintiff by the defendant Tuppela, on March 11th, 1918, as his, Tuppela's attorney, it became and was the duty of the plaintiff to bring and prosecute such suit with rea-

sonable skill and diligence; that plaintiff knew, or should have known, that delay in bringing said suit and promptly assisting the rights of Tuppela greatly endangered his client's interest in and right to the property involved, but that, notwithstanding, plaintiff wilfully or negligently failed to file said suit, or to take any steps whatsoever under his said employment; that said Tuppela waited upon plaintiff for more than a year, repeatedly requesting him to file said suit, but the plaintiff still failing to do anything but having wholly abandoned his said employment, the said Tuppela, on or about May 2d, 1919, employed other counsel to perform such services, upon substantially the same terms as he had formerly employed the plaintiff; that plaintiff knew of such employment and knew that such employment was had under the belief on the part of Tuppela that plaintiff had abandoned his connection with the case, and so knowing plaintiff made no objection thereto; did not aid nor offer to aid in any way in the prosecution of said suit, but acquiesced in the changes made in his situation and obligations by Tuppela, intending, however, to thereby escape all the burdens, risks and obligations of his said employment, but in the event of the final recovery of said property through the efforts, risks and expense of other counsel so employed by Tuppela, to assert a claim under the said contract of March 11th, 1918. [24] That if plaintiff had not in fact abandoned his said employment, it was his duty to and he could and would have aided and taken part in the prosecution of said suit, and shared

in the burdens and risks of the counsel therein, as well as the benefits resulting from the success finally achieved. That by his conduct aforesaid, plaintiff misled the said Tuppela and induced him to employ other counsel and pay them full value for professional services in said suit, and now seeks to recover the defendants' all and more than all the money and property obtained from said litigation. That by reason of the premises plaintiff is now estopped to claim said contract of March 11, 1918, was not abandoned, or that it has or had any binding force whatsoever.

And for a fifth affirmative defense to said complaint, defendants allege:

Plaintiff ought not to have and maintain this suit against them, for that:

If plaintiff did not wholly abandon said contract of employment alleged by him, prior to the time of the employment of other counsel by Tuppela, he was guilty of gross professional negligence, which justified the said Tuppela in discharging him, in this: Plaintiff knew, or by the use of ordinary skill and diligence should have known, that delay in the bringing of said suit and the prompt assertion of the claim of said Tuppela to said property, would greatly endanger the rights of the said Tuppela thereto by laying the foundation for a plea of laches by the said Chichagoff Mining Co. That it was the plaintiff's duty, upon accepting said employment, to bring and prosecute said suit with reasonable skill and diligence, and under the peculiar circumstances of said suit, it was his imperative duty so

to do; but the plaintiff wilfully or negligently failed to bring said suit, or to take any steps whatsoever therein; and after the expiration of more than a year from the date of employment of plaintiff [25] by Tuppela, the latter, in order to avoid the full consequences to himself of the plaintiff's neglect, employed other counsel, and put an end to his contract with the plaintiff.

And, for a further affirmative defense to the third cause of action set out in said complaint, defendants allege:

That if plaintiff did advance any moneys as therein alleged, he made such advances under his contract with Tuppela, which said moneys were only to be repaid upon the successful termination of a suit to be brought and prosecuted by the plaintiff. That plaintiff wholly failed and neglected to bring and prosecute such suit, and the moneys so advanced and expected by plaintiff, if any, were of no benefit whatever to said Tuppela, but were expended solely in a futile effort by plaintiff to earn a fee.

WHEREFORE, defendants pray that plaintiff take nothing by this action, and that they receive of plaintiff their *cases* and disbursements.

GROVER C. WINN and

J. H. COBB,

Attorneys for Defendants.

J. H. COBB,

Guardian *ad Litem* for John Tuppela.

United States of America,
Territory of Alaska,—ss.

John H. Cobb, being first duly sworn, deposes and says: I am one of the defendants above named. The above and foregoing complaint is true as I verily believe.

J. H. COBB.

Subscribed and sworn to before me this, the 16 day of June, 1922.

[Notary Seal]

J. W. KEHOE,

Notary Public in and for Alaska.

My commission expires Sept. 15, 1925. [26]

AGREEMENT.

This instrument made this 11th day of March, 1918, by and between John Tuppela of Astoria, Oregon, party of the first part, and Enoch E. Mathison, of Astoria, Oregon, party of the second part, WITNESSETH:

That whereas, the party of the first part claims to have interest in several of the mining claims situated at Chichagof in the Sitka precinct in the territory of Alaska, more particularly described and named as follows, to wit: "Over the Hill" lode mining claim, "Pacific" lode mining claim, "Golden West" lode mining claim, "Rising Sun" lode mining claim, and the "Porphyry" lode mining claim, all at Chichagof in the Sitka Precinct of the Territory of Alaska, aforesaid; and

Whereas, the party of the first part has other interests in other properties at or near Sitka, Alaska,

Whereas, title and interest of the party of the first part to the property or properties aforesaid, is in dispute, and

Whereas, the party of the second part is an attorney at law, duly licensed to practice, and

Whereas, the party of the first part has engaged, retained and employed the party of the second part to act for him and in his stead in all legal matters pertaining to the prosecution of the claims of the party of the first part, in and to the property described above, and to represent him in the courts of law and equity, and in all other courts in which it may become necessary for the proper prosecution of said claims, and for the complete settlement and adjustment arising out of said claims or actions instituted thereof.

Now, therefore, the party of the first part in consideration of the services to be rendered by the party of the second part, does hereby promise and agree that the party of the second part may receive and recover one half of the interests in said properties hereinbefore described, or one half of the net proceeds from the sale of same, or if any damages be recovered from any of the parties claiming interest in said properties, then and in that case the party of the first part agrees and promises to pay one half of the proceeds collected of said damages.

It is further understood and agreed by and between the parties hereto that the party of the second part may associate any other attorney or attorneys with him as associate counsel in all mat-

ters herein, and the party of the second part in consideration of the payments to be made as hereinbefore set forth, promises and agrees to represent the party of the first part in all matters pertaining to his right or rights in the properties aforesaid, and to prosecute any action or suit growing out of same and in all courts as in his judgment shall deem best and proper, for the successful consummation of said litigation or claims, and the party of the second part, as attorney for the party of the first part, is hereby authorized and directed to collect any moneys that may be recovered from said interests or action, and to account to the party of the first part in accordance with the terms of this agreement. [27]

In witness whereof, the parties hereto have hereunto set their hands and seals in duplicate, this 11th day of March, 1918.

JOHN TUPPELA,

Party of the First Part,

ENOCH E. MATHISON,

Party of the Second Part.

Signed and sealed in presence of

LAURI MOILANEN.

J. J. BARRETT.

State of Oregon,

County of Clatsop,—ss.

Be it remembered, that on the 11th day of March, 1918, before me, the undersigned, a notary public, in and said County and State, personally appeared the within named John Tuppela and Enoch E.

Mathison, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In Testimony Whereof, I hereunto set my hand and notarial seal, the day and year last above written.

[Seal]

J. J. BARRETT,
Notary Public for Oregon.

Filed in the District Court, District of Alaska,
First Division Jun. 17, 1922. John H. Dunn, Clerk,
By W. B. King, Deputy. [28]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

· ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB as Trustee for
JOHN TUPPELA and GROVER C. WINN,
as Guardian of the Person of JOHN TUPPELA,

Defendants.

Reply to Second Amended Answer.

Replying to defendant's second amended answer herein, plaintiff admits, denies and alleges:

I.

Replying to the paragraph commencing with the

words "Referring to paragraph VIII" found on pages 3 and 4 of said second amended answer, plaintiff denies that the defendant Tuppela received as his share, under the accounting of the settlement with the Chichagoff Mining Company, only \$114,250.00 and only an undivided one-quarter interest in the "Over the Hill" and "Pacific" lode mining claims and only an undivided one-half interest in the "Rising Sun" lode mining claims, and alleges that on the contrary said Tuppela received under said accounting the sum of \$300,000.00 and an undivided one-half interest in the "Over the Hill" and "Pacific" lode mining claims and the whole of the "Rising Sun" mining claims.

II.

And replying further to the "First and Affirmative Defense" contained in said second amended answer on page 5 thereof, plaintiff denies each and every allegation thereof, except plaintiff admits that it was within the contemplation of plaintiff and of said defendant Tuppela to prosecute to final determination by such action, legal or otherwise, as might be necessary the claims of said Tuppela against the Chichagoff Mining Company and that plaintiff has never been admitted to practice in the courts of the territory of Alaska, [29] but plaintiff alleges that said defendant Tuppela wrongfully prevented plaintiff from prosecuting said claims to final determination.

III.

And replying to the "Second Affirmative Defense" contained in said second amended answer on pages

5 and 6 thereof, plaintiff denies each and every allegation thereof.

IV.

And replying to the "third affirmative answer" contained in said second amended answer on pages 6 and 7 thereof, plaintiff denies each and every allegation thereof, save and except plaintiff admits that said Tuppela became insane in or about the year 1914 and was sent to the Morningside Asylum for treatment and that he was discharged therefrom on or about December 17, 1917; and that plaintiff is and has held himself out as an attorney at law for many years, and long prior to the year 1918, and that after said Tuppela's discharge from said asylum he was desirous of finding an attorney to bring a suit on his behalf to recover certain mining claims and other property from the Chichagoff Mining Company, and that, on or about March 11, 1918, plaintiff and said defendant Tuppela entered into a contract, a substantial copy of which is attached to said amended answer.

V.

And replying to the "fourth affirmative defense" contained in said second amended answer on pages 7, 8 and 9 thereof, plaintiff denies each and every allegations thereof.

VI.

And replying to the "fifth affirmative defense" contained in said second amended answer on pages 9 and 10 thereof, plaintiff denies each and every allegation thereof.

VII.

And replying to the “further affirmative defense” contained in said second amended answer on pages 10 thereof, plaintiff denies each and [30] every allegation thereof.

WHEREFORE plaintiff renews his prayer as in his complaint herein contained.

R. E. ROBERTSON,
Of Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

R. E. Robertson, being first duly sworn on oath, deposes and says; that he is one of counsel for plaintiff in the foregoing action; that he is a citizen of the United States, a resident of the territory of Alaska, and over the age of 21 years; that he has read the foregoing reply and knows the contents thereof, and that the same is true as he verily believes; that the reason he makes this verification is that the plaintiff is not now in or a resident of the District of Alaska, but is absent therefrom.

R. E. ROBERTSON.

Subscribed and sworn to before me this 21st day of July, 1922.

[Seal]

JOHN H. DUNN,
Clerk Dist. Court for Alaska.

Copy of the foregoing reply received this 22d day of July, 1922.

Of Counsel for Defendants.

Filed in the District Court, District of Alaska,
First Division. Jul. 22, 1922. J. H. Dunn, Clerk.
By —————, Deputy. [31]

In the District Court for the District of Alaska
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB, as Trustee for
JOHN TUPPELA and GROVER C. WINN, as
Guardian of the Person of JOHN TUPPELA.

Defendants.

Judgment.

This matter having heretofore, on November 8, 1922 come on regularly for trial in the above entitled court before a jury duly and regularly empanelled and sworn to try the issues thereof, and the parties having duly appeared by their respective attorneys, and thereupon the evidence of said parties having been duly adduced in open court before said jury, and each of said parties having rested, and thereupon, after argument of respective counsel, the jury, having been instructed by the Court, retired to the jury-room, and thereafter returned in open court and rendered their verdict herein, which said verdict was duly filed herein on November 13, 1922, and which said verdict is, in words and figures, as follows, to wit:

“In the District Court for the District of Alaska,
Division Number One, at Juneau.

Case No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELLA, J. H. COBB as Trustee for
JOHN TUPPELA and GROVER C. WINN,
as Guardian of the Person of JOHN
TUPPELA.

Verdict.

We, the Jury, duly and regularly empanelled and sworn to try the issues in the above-entitled cause, find for the [32] plaintiff, Enoch E. Mathison, on the second cause of action of the complaint and assess his damages in the sum of \$2500.00; and we, the jury, duly and regularly empanelled and sworn as aforesaid, find for the plaintiff, Enoch E. Mathison, on the third cause of action of the complaint in the sum of \$362.50, with interest at the rate of six per cent (6%) per annum from October 18, 1921.

B. H. BERTHOLL,

Foreman.

Filed in the District Court, District of Alaska,
First Division. Nov. 13, 1922. John H. Dunn,
Clerk.

Entered Court Journal No. 5, page 424.”

And thereupon the plaintiff, having filed his
motion for a judgment notwithstanding said ver-

dict, and a motion for a new trial, and the defendants having filed their motion for a new trial, and all of said motions having been denied, and the Court being now fully advised in the premises,

IT IS NOW, THEREFORE, HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff have judgment against the defendants and each of them for the sum of \$2,500.00, as damages, together with interest thereon at the rate of 8% per annum from date until paid; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that the plaintiff have judgment against the defendants, and each of them, for the sum of \$362.50, together with interest thereon at the rate of 6% per annum from October 18, 1921, amounting to \$23.55, said principal and interest aggregating at this date \$386.05, together with interest on said \$386.05 at the rate of 8% per annum from date until paid; and

IT IS FURTHER ORDERED, ADJUDGED and DECREED that plaintiff have and recover from the defendants his costs herein to be taxed.

Done in open court this 18th day of November, 1922.

THOS. M. REED,
District Judge. [33]

All the parties, both plaintiff and defendant, having excepted to the foregoing judgment, an exception is hereby allowed to each of the parties to this action to the making and entry of this judgment.

Done in open court this 18th day of November, 1922.

THOS. M. REED,
District Judge.

O. K.—COBB.

Filed in the District Court, District of Alaska, First Division, Nov. 18, 1922. John H. Dunn, Clerk. By ————, Deputy.

Entered Court Journal No. R., pages 447 and 448.
[34]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHESON,

Plaintiff,

vs.

JOHN TUPPELA et al.,

Defendants.

Bill of Exceptions.

BE IT REMEMBERED that on the trial of the above-entitled and numbered cause, the following proceedings were had, to wit:

The jury having been selected, impaneled and sworn, the defendants moved the Court to require the plaintiff to elect, as between the first and second cause of action, upon which he would go to trial.

The COURT.—I'll hear from the other side.

Mr. ROBERTSON.—The plaintiff at this time, as between the first and second causes of action, elects to go to trial upon the second. [35]

Testimony of Enoch E. Mathison, in His Own Behalf.

ENOCH E. MATHISON, the plaintiff herein, called as a witness on his own behalf, having been first duly sworn, to tell the truth, the whole truth, and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Mr. Mathison, will you please state your name to the reporter?

A. Enoch E. Mathison—M-a-t-h-i-s-o-n.

Q. How old are you Mr. Mathison?

A. Forty-three.

Q. Of what country are you a citizen?

A. United States.

Q. How long have you been a citizen of the United States? A. Since 1887.

Q. In what country were you born?

A. Norway.

Q. Are you of Finnish descent or parentage?

A. Finnish and Norwegian.

Q. One of your parents was Finnish and one Norwegian, is that correct. A. Yes, sir.

Q. Where do you reside, Mr. Mathison?

A. Astoria, Oregon.

Q. How long have you resided in Astoria, Oregon?

(Testimony of Enoch E. Mathison.)

A. I have resided there the last time since March, 1916.

Q. What business are you engaged in at Astoria, Oregon? A. Attorney at law.

Q. How long have you been engaged in that business? A. I was admitted in July, 1915.

Q. How long—

Mr. COBB.—(Interrupting.) I think the certificate of admission is the best evidence. [36]

The COURT.—Yes.

Mr. ROBERTSON.—Yes, we'll produce that, if the Court please.

The COURT.—Well, he may answer the question and then produce the certificate.

Q. The question is, How long have you been practicing law? A. Since July, 1915.

Q. Now, are you a graduate of any law school?

A. The University of Oregon.

Mr. COBB.—Wait a minute. We object that.

Mr. ROBERTSON.—How would we ever prove it except by asking him, Mr. Cobb?

Mr. COBB.—You've got a certificate of it.

The COURT.—Well, he may answer that.

Q. You're a graduate of the University of Oregon Law School, is that it? A. Yes, sir.

Q. Now, Mr. Mathison, are you a member of the Supreme Court of Oregon?

A. Yes, sir.

Q. The bar of the Supreme Court of Oregon?

A. Yes, sir.

Q. You have a certificate from that court?

(Testimony of Enoch E. Mathison.)

A. I have, sir.

Q. Look at that and say whether or not that is the certificate? (Handing document to witness.)

A. (Examining document.) Yes, sir; this is the one.

Mr. COBB.—We object to that as irrelevant and immaterial. That doesn't qualify him to practice in this court.

Mr. ROBERTSON.—Of course, we take the position— [37]

The COURT.—(Interrupting.) Objection overruled, because of the peculiar wording of the contract, authorizing him to employ other attorneys or associate other counsel.

(Whereupon said certificate of admission was received in evidence and marked Plaintiff's Exhibit No. 1.)

Mr. COBB.—We'll note an exception.

Mr. ROBERTSON.—I will ask that the certificate be marked and also request that we be given permission to have the Clerk make a certified copy of it and return the original to Mr. Mathison.

Mr. COBB.—Well, so far as that is concerned, you may let the record show the substance, or you may offer a copy.

Mr. ROBERTSON.—We'd rather have a copy so as not to mark up the original.

Q. Now, Mr. Mathison, are you admitted to the bar of the federal court for the District of Washington?

A. Yes, sir; I am.

(Testimony of Enoch E. Mathison.)

Q. Do you recall, offhand, what date you were admitted to the bar of that court?

A. No, I don't—either 1915 or 1916.

Q. Before coming up here this time, did you obtain a certified copy of your certificate of admission to that bar? A. Yes, sir.

Q. I will ask you if that is the certificate (handing paper to witness)?

A. Yes, sir; this is the one.

Mr. COBB.—I think that it is wholly irrelevant and immaterial. Our statute is silent upon the District Courts of the United States in the States, and it is immaterial. He is authorized to practice in the District Court, federal or Oregon but—

Mr. ROBERTSON. — (Interrupting.) We're simply showing that— [38]

The COURT.—Objection overruled.

Mr. COBB.—We except.

Q. Now, from that certificate, will you refresh your memory from it, Mr. Mathison. Do you recall, now, that you were admitted on the twenty-second day of November, 1915, is that correct?

A. Yes, sir; that is the correct date.

Q. I offer that in evidence and also request the privilege—Do you care to have that particular copy, Mr. Mathison? A. Yes.

Mr. ROBERTSON.—I would like to have the clerk make a certified copy of that.

(Whereupon Clerk was instructed to have copy made.)

Q. Now, then, Mr. Mathison, will you state how

(Testimony of Enoch E. Mathison.)

long you have been engaged in the practice of law in Astoria, Oregon? A. Since March, 1916.

Q. And prior to that time where had you practiced? A. Portland.

Q. At Portland, Oregon?

A. Portland, Oregon; yes, sir.

Q. What, if any, occupation or business were you engaged in prior to your admission to the bar?

Mr. COBB.—We object to that as irrelevant and immaterial.

Mr. ROBERTSON.—If the Court please, I would just like to state before the Court rules on that—the purpose of that is that we feel that if we can show that Mr. Mathison was engaged in a business allied to the law business for a number of years before—it's like an apprenticeship or a scholarship, even though the actual admission is the final, ultimate thing that shows the man holds himself out to the public as a practitioner. [39]

The COURT.—I sustain the objection. Admission to the bar necessarily requires a certain amount of study and certain qualifications.

Mr. ROBERTSON.—Very well.

Q. Now Mr. Mathison, in 1917 and 1918, were you then practicing law in Astoria, Oregon?

A. I was.

Q. Whereabouts does your practice extend?

Mr. COBB.—We object to that as irrelevant and immaterial.

The COURT.—Objection overruled.

A. In the state courts of the State of Washing-

(Testimony of Enoch E. Mathison.)

ton and Oregon and also the District Courts of both of the states.

Q. The District Courts?

A. I mean the United States District Courts.

Q. How about your Supreme Courts?

A. The state Supreme Courts?

Q. Yes, sir.

A. Yes, sir; practice in both of the Supreme Courts.

Q. Of both the State of Washington—

A. Of both.

Q. (Continuing.) And Oregon?

A. Of both the States of Washington and Oregon.

Q. Now, what was the general nature of your practice? A. Well, it was general practice.

Q. General practice of law? A. Yes.

Q. Along in the fall of 1917, Mr. Mathison, did you have occasion at any time to come in contact with the defendant, John Tuppela, in this case?

A. Yes, sir; I did. [40]

Q. At that time where was John Tuppela?

A. I met him at a sanitarium at Portland.

Q. Met him at a sanitarium at Portland, Oregon. How did you happen to meet him there at that time?

Mr. COBB.—We think this is wholly irrelevant and immaterial. I don't care anything about it, except that it is irrelevant and immaterial. The contract is alleged to have been made on March 11th.

(Testimony of Enoch E. Mathison.)

The COURT.—Well, it may be material to some facts leading up to the contract.

Mr. COBB.—How is that?

The COURT.—It may be material as showing the facts and the associations of the parties leading up to the contract, the execution of the contract.

Mr. ROBERTSON.—It's simply preliminary—leading up to the contract. We can't start in with the contract.

The COURT.—Objection overruled.

Mr. COBB.—Very well.

A. I met him at the Jurvas Sanitarium, some time in the latter part of November, 1917.

Q. How did you happen to meet him there at that time?

A. I was requested to go and see him at that time.

Q. Well, at that time whereabouts, if any place, was he confined?

A. He was on parole at that time.

Q. On parole from what?

A. From the Morningside institution.

Q. Is that the institution to which the insane persons from Alaska are sent? A. Yes, sir.

Q. And at the time you met him he was on parole? [41]

A. On parole at what is known as the Jurvas Sanitarium.

Q. At that time did you have any talk with Mr. Tuppela? A. I did.

Q. What was the nature of that conversation?

(Testimony of Enoch E. Mathison.)

Mr. COBB.—We object to that on the ground that Mr. Tuppela is admitted in the pleadings to have been now insane and any conversations that occurred between them are inadmissible against him, the same as if he were dead.

The COURT.—I'll hear from you on that.

Mr. ROBERTSON.—Well, I don't know of any statute that prevents you from giving testimony, giving in evidence the admissions of a decedent against himself after death.

Mr. COBB.—Only conversations?

Mr. ROBERTSON.—Or conferences.

The COURT.—Yes.

Mr. ROBERTSON.—For instance, the fact that this man was or has since become insane, certainly doesn't shut out all the testimony or all the statements that he may have made in entering into the contract. Now, assuming, in this case, if the Court please, for instance, that this suit was instituted after Mr. Grover C. Winn was appointed guardian of his person; assuming that this suit had been instituted two days before the date when Mr. Cobb, in his statement, admits that the man was insane, then could the adjudication of insanity shut out Mr. Mathison's giving statements which might be most important in order to show his rights against the man who had been adjudicated insane? Now, then, if that is not true, why was it—

The COURT.—(Interrupting.) You don't get the point. This man was adjudicated insane and he had not been discharged from the asylum. [42]

(Testimony of Enoch E. Mathison.)

Mr. ROBERTSON.—Oh, at the time he met him?

The COURT.—At the time of this conversation.

Mr. ROBERTSON.—I beg your pardon.

The COURT.—Any statements made while the adjudication of insanity was still on, I think, would be incompetent.

Q. Well, now, Mr. Mathison, what, if anything, occurred to Mr. Tuppela about that time as to whether or not he was discharged or not discharged from Morningside Asylum?

A. He was not discharged from the Morningside Asylum, but he was on parole.

Q. Well, do you know when he was discharged from Morningside asylum, or approximately the time?

A. He was discharged in December; the latter part of December.

Q. What year? A. 1917.

Mr. COBB.—We might agree on that day.

Mr. ROBERTSON.—December 19th.

Mr. COBB.—December 19th.

Q. Now, then, after Mr. Tuppela was discharged from the asylum, did you have occasion to see him again? A. Yes, I saw him.

Q. Whereabouts? A. In my office.

Q. In what city? A. In Astoria, Oregon.

Q. About what time was that?

A. That was shortly after he came down.

Q. I mean what time of the year?

A. Probably between Christmas and New Year's, 1917.

(Testimony of Enoch E. Mathison.)

Q. Christmas of 1917 and New Year's of 1918, is that what you [43] mean? A. Yes.

Q. And do you recall at this time what the general subject of that conversation was? A. Yes.

Q. What was it?

A. The conversation at that time was about his rights in certain mining claims here in Alaska, and what efforts he had made to employ counsel to recover his rights or moneys, as he stated then.

Q. Well, what did he say he had done in reference to consulting counsel?

A. He stated that he had consulted two firms of attorneys in Portland prior to that and they had, both of them had turned his case down for the reason that they didn't believe that he had a cause of action and that if he did have, it was difficult to prove, and that it would be useless for them, or for him, to attempt to recover, and that he should recover, or take what was offered by the administrator.

Q. Did he tell you who those firms of attorneys were? A. Yes, sir.

Q. Who did he tell you they were?

A. A. E. Clark was one.

Mr. COBB.—I think I shall object to that. That's wholly irrelevant and immaterial.

The COURT.—I don't see the materiality. I'll hear from you.

Mr. ROBERTSON.—Of course, this is, as we view it, all preliminary—leading up to the actual execution of the written contract. But it also

(Testimony of Enoch E. Mathison.)

shows, in addition to that, particularly [44] this conversation, it shows what Mr. Mathison did in those preliminary negotiations, and also shows Tuppela's frame of mind relative to his alleged rights at the time that he first consulted Mr. Mathison, and we expect to show that at that time it was on Mr. Mathison's advice that he did not accept the amount offered by the administrator; and it seems to us that this is absolutely proper to go to the jury to show, not only that the negotiations were leading up to the actual execution of the contract, but were all leading up to an ultimate, successful consummation of any suit or litigation in Tuppela's favor.

The COURT.—Your contention is that Mr. Tuppela was advised by Mr. Mathison as to the legal aspect of this case at that time?

Mr. ROBERTSON.—In what year?

The COURT.—Yes.

Mr. ROBERTSON.—This was about New Year's, 1918.

The COURT.—And that the relation of attorney and client then existed between the parties?

Mr. ROBERTSON.—No, sir; no, sir; but these were the preliminary negotiations leading up to the making of the contract.

The COURT.—I'll sustain the objection.

Q. Now, then Mr. Mathison, at that time, did you have any other conversation with Mr. Tuppela?

Mr. COBB.—We object to it as irrelevant and immaterial—any conversation at that time. This was in 1917. Get down to the contract.

(Testimony of Enoch E. Mathison.)

Q. Relative to the entering into of any contract.

Mr. COBB.—We object to that as irrelevant and immaterial. There is no rule better established than that preliminary— [45] unless there is some question as to its construction—that preliminary negotiations are immaterial, because they're all merged into the written contract.

The COURT.—I think I shall sustain the objection.

Q. Now, Mr. Mathison, at this time did you do anything relative to ascertaining under what procedure Mr. Tuppela had originally been put in the asylum at Morningside?

Mr. COBB.—We object to that as irrelevant and immaterial. He is not suing for the value of his work. It makes no difference what he did. He is suing on this contract, for damages for its breach.

The COURT.—Under the contract itself?

Mr. COBB.—Under the contract itself.

The COURT.—Objection sustained.

Q. Very well. Now, then, during this period, from Christmas, 1917, Mr. Mathison, up to about March 11, 1918, did you and Mr. Tuppela have any conversation relative to entering into a contract, the making of a contract between you, covering the matter of the relationship of attorney and client, for the recovery of certain claims from the Chichagoff Mining Company?

Mr. COBB.—That's the same thing. We object to it as irrelevant and immaterial—conversation prior to the time the contract was made.

(Testimony of Enoch E. Mathison.)

Mr. MANNIX.—If the Court please, one of the defenses set up in this case is—

The COURT.—(Interrupting.) That's what I was thinking about.

Mr. MANNIX.—(Continuing.) Sets up the fact that this contract does not express the real intentions of the parties.

The COURT.—Yes. [46]

Mr. MANNIX.—And I think it would be very material under those circumstances.

The COURT.—That is just—

Mr. COBB.—(Interrupting.) Well, you have a deposition on file which is said to have been read to him in the Finnish language and explained.

The COURT.—Objection overruled.

A. I did have.

Q. Now, then, during the course of those conversations, what if anything, did you advise Mr. Tuppela with reference to your standing, in case it should be necessary to bring suit in the courts of Alaska—

Mr. COBB.—We object to that as irrelevant and immaterial. That doesn't apply to the contract. That is getting at something entirely different from what they said they wanted to introduce it for. Now, if they want to show that Mr. Tuppela understood that the contract was drawn and read to him, why the Court's ruling goes to that. Now, they are asking for a conversation as to what he said his standing was going to be. Of course, that isn't relevant or at all material.

(Testimony of Enoch E. Mathison.)

Mr. MANNIX.—If the Court please, I think Mr. Cobb has misconstrued the purpose of the question. It is not for the purpose of showing the execution of the contract necessarily, but it is for the purpose of meeting the objection specifically interposed to the effect that the contract as introduced in evidence is not the real contract between the parties. The purpose of this testimony is to show what the real understanding of the parties was—to give the jury a view of just what transpired between the parties, so that the jury ultimately can determine whether this contract [47] actually submitted, is the real agreement between the parties. That is the purpose of this question.

The COURT.—I think I'll overrule the objection for the purpose stated.

Mr. COBB.—I ask that the testimony be confined to that. Of course, if that is the purpose of it, I have no objection, but the question is not—

The COURT.—(Interrupting.) Yes, the form of the question makes it very doubtful what is meant.

(Question repeated by reporter.)

Mr. COBB.—Now, that question doesn't fall within the purview of the ruling of the Court. I object to that question. Let him ask directly, in compliance with the ruling of the Court that they may show that Mr. Tuppela understood the contract as finally made and that that was the contract between them.

Mr. ROBERTSON.—I withdraw the question to save any further argument.

(Testimony of Enoch E. Mathison.)

Mr. COBB.—Yes; I think that is better.

Q. Now, Mr. Mathison, did you and Mr. Tuppela, sometime the fore part of March, 1918, enter into any contract relative to the relationship of attorney and client between you and him concerning these claims he spoke to you about over near Chichagoff?

A. Yes, we did.

Q. Now, I will hand you a paper here that is marked in this case Plaintiff's Exhibit No. 1 for identification, having been attached to a deposition, and ask you to look at it and say whether or not that is the contract?

A. (Examining document.) Yes, sir; this is the contract. [48]

Q. Is that the original—one of the original copies of the contract? A. Yes, sir.

Q. I will offer that contract in evidence.

Mr. COBB.—No objection.

The COURT.—The contract that is pleaded on?

Mr. ROBERTSON.—Yes.

The COURT.—That the defendant pleaded on?

Mr. COBB.—A copy of it is attached to the answer—the same thing.

Mr. ROBERTSON.—And ask to have it marked.

Mr. COBB.—So that there can be no dispute about that.

(Whereupon said contract was received in evidence and marked Plaintiff's Exhibit No. 3.)

Mr. ROBERTSON.—The contract is as follows (reads):

(Testimony of Enoch E. Mathison.)

Plaintiff's Exhibit No. 3.

“This instrument made this 11th day of March, 1918, by and between John Tuppela of Astoria, Oregon, party of the first part, and Enoch E. Mathison, of Astoria, Oregon, party of the second part, witnesseth:

“That whereas the party of the first part claims to have interest in several of the mining claims situated at Chichagof in the Sitka precinct in the Territory of Alaska, more particularly described and named as follows, to wit: Over the Hill lode mining claim, Pacific lode mining claim, Golden West lode mining claim, all at Chichagof in the Sitka Precinct of the Territory of Alaska, aforesaid; and

“Whereas, the party of the first part has other interests in other properties at or near Sitka, Alaska,

“Whereas, title and interest of the party of the first part to the property or properties aforesaid, is in dispute, and [49]

“Whereas, the party of the second part is an attorney at law, duly licensed to practice, and

“Whereas, the party of the first part has engaged, retained and employed the party of the second part to act for him and in his stead in all legal matters pertaining to the prosecution of the claims of the party of the first part, in and to the property described above, and to represent him in the courts of law and equity, and in all other courts in which it may become necessary for the proper prosecution

(Testimony of Enoch E. Mathison.)

of said claims, and for the complete settlement and adjustment arising out of said claims, or actions instituted thereof.

“Now, therefore, the party of the first part, in consideration of the services to be rendered by the party of the second part, does hereby promise and agree that the party of the second part may receive and recover one-half of the interests in said properties hereinbefore described, or one-half of the net proceeds from the sale of same, or if any damages be recovered from any of the parties claiming interest in said properties, then and in that case the party of the first part agrees and promises to pay one-half of the proceeds collected of said damages.

“It is further understood and agreed by and between the parties hereto that the party of the second part may associate any other attorney or attorneys with him as associate counsel in all matters herein, and the party of the second part, in consideration of the payments to be made as hereinbefore set forth, promises and agrees to represent the party of the first part in all matters pertaining to his right or rights in the properties aforesaid and to prosecute any action or suit growing out of same, and in all courts as in his judgment shall deem best and proper for the successful consummation of said litigation [50] or claims, and the party of the second part, as attorney for the party of the first part, is hereby authorized and directed to collect any moneys that may be recovered from

(Testimony of Enoch E. Mathison.)

said interests or action, and to account to the party of the first part in accordance with the terms of this agreement.

“In witness whereof, the parties hereto have hereunto set their hands and seals in duplicate, this 11th day of March, 1918.

“JOHN TUPPELA,

“Party of the First Part.

“ENOCH E. MATHISON,

“Party of the Second Part.

“Signed and sealed in presence of

“LAURI MOILANEN.

“J. J. BARRETT.

“State of Oregon,

“County of Clatsop,—ss.

“Be it remembered, that on this 11th day of March, 1918, before me, the undersigned, a notary public in and said county and State, personally appeared the within named John Tuppela and Enoch E. Mathison, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned.

“In Testimony Whereof, I have hereunto set my hand and notarial seal, the day and year last above written.

[Seal]

“J. J. BARRETT,

“Notary Public for Oregon.”

(Testimony of Enoch E. Mathison.)

Q. Now, Mr. Mathison, referring to this contract, Plaintiff's [51] Exhibit No. 1 in this case, made on March 11, 1918, I will ask you how did it happen that you and Mr. Tuppela entered into that contract?

Mr. COBB.—I don't think that is material. They made the contract and the contract speaks for itself.

The COURT.—Well, I'll overrule the objection.

A. Having had a number of interviews with him relative to his claims, he was anxious that I should take the matter up and do what I could for him, and during these interviews I ascertained that his rights at that time were more or less indefinite and that it would require considerable preliminary investigation as to whether or not he had any rights in the—

Mr. COBB.—(Interrupting.) We object to that as not responsive to the question. It is immaterial and I ask that it be stricken out. He is asking him about a specific time.

Mr. ROBERTSON.—I asked him how they happened to enter into this contract.

The COURT.—Objection overruled.

A. Of course, I wired the administrator, Mr. Mills, for statements—

Mr. COBB.—We object to that as not the best evidence. Let him produce such writing.

The COURT.—Objection overruled.

Mr. ROBERTSON.—We didn't ask him to testify as to the contents.

(Testimony of Enoch E. Mathison.)

Mr. COBB.—He is testifying as to the substance of it.

The COURT.—Objection overruled.

Mr. COBB.—Except.

A. And through these wires and correspondence, I ascertained [52] that he did have some property here which was sold. I then wired up for certified copies of the probate proceedings as well as the proceedings relative to his commitment and received those certified copies.

Q. Now, Mr. Mathison, whose name did you use in wiring to Mr. Mills at Sitka?

A. I used Mr. August Nikola.

Q. And you have those original papers yourself?

A. No; I have not—just the certified copy of the proceedings is all I have.

Q. That is, you say you received a certified copy of the proceedings back from—

A. (Interposing.) From the Recorder at Sitka.

Q. I will ask you to look at these papers here, Mr. Mathison, and state whether or not they are the papers that you referred to that you got back as certified copies.

A. (After examining papers.) Yes, sir; these are the identical ones.

Mr. ROBERTSON.—I will offer them in evidence simply for the purpose, at this time, of corroborating these statements of the witness that he wired and got these papers.

Mr. COBB.—I don't see that they are at all

(Testimony of Enoch E. Mathison.)

material or why they should go into the evidence in this case. I don't see what fact they would tend to prove that is in issue.

Mr. ROBERTSON.—Well, I simply offer them as corroborative—

The COURT.—(Interrupting.) Do you object?

Mr. ROBERTSON.—If counsel objects to them, why—

Mr. COBB.—Oh, with the understanding that it may go in without the contents burdening up the record.

The COURT.—They may be received, then, simply for the purpose [53] of corroborating the testimony of the witness leading up to the entering into of the contract.

(Whereupon said papers were received in evidence and marked Plaintiff's Exhibit No. 4.)

Q. Now, then, Mr. Mathison, after this, as I understand it, you entered into this written contract with Mr. Tuppela, is that correct?

A. After I received these papers, I called him in and interviewed him as to whether these proceedings were connected with his property and claims and found out that they were, and also found out the claims, the name of the claims and the district that they were in and under what conditions they were sold. I then told him what was best to be done in the matter.

Q. Now, then, in what language did you and Mr. Tuppela ordinarily converse?

A. The Finnish language.

(Testimony of Enoch E. Mathison.)

Q. How did you happen to converse in Finnish?

A. Well, it was very material with him, because he could much more easily speak himself clearly in the Finnish language than he could in the English language.

Q. Do you speak the Finnish language fluently yourself? A. Fairly fluently; yes.

Q. Do you also write it?

A. Yes, I can write it.

Q. Now, at the time that this contract was entered into, just explain the circumstances at that time; that is, the details of it—whether or not it was or was not explained to Mr. Tuppela, and if so, how?

A. Well, Tuppela wanted me, he first wanted me to write to the Chichagoff Mining Company—

Q. (Interrupting.) No; I mean this contract of March 11, 1918. [54]

A. Well, that is what I am referring to. Prior to that he asked me to write to the company and ask them to send—to buy his interest out—

Mr. COBB.—(Interrupting.) I object to that. It is not responsive to the question, irrelevant and immaterial.

The COURT.—It may be excluded.

Mr. ROBERTSON.—I mean, now—

The COURT.—(Interrupting.) The circumstances of entering into the contract—what was done and what was said at the time.

Q. At the time?

A. At the time of entering into the—the execution of the contract?

(Testimony of Enoch E. Mathison.)

Q. Yes.

A. Well, at the time of the execution of the contract, the contract was read to him.

Q. In what language was it read to him?

A. The Finnish language as well as the English language.

Q. Pardon me?

A. The Finnish as well as the English language.

Q. Who acted as interpreter?

A. Mr. Lauri Moilanen.

Q. Mr. Lauri Moilanen?

A. Yes; he used to be interpreter in the courts.

Q. Who was he?

A. He was a reporter for one of the Finnish dailies over there, a newspaper.

Q. Where is Mr. Moilanen now?

A. I believe he is at Fitchburg, Massachusetts.

Q. At Fitchburg, Massachusetts. Now, what, if anything, did [55] you do relative to explaining it to Mr. Tuppela?

A. Of course, the contract was read to him and explained, so that he was informed and had knowledge as to the contents of the contract, and that embodied all the agreements that we had entered into before—preliminary to the execution.

Q. What, if anything, did you at that time or had you prior to that time, told Mr. Tuppela with reference to your being admitted to practice in the courts of Alaska?

Mr. COBB.—We object to that as irrelevant and immaterial.

(Testimony of Enoch, E. Mathison.)

The COURT.—Objection overruled.

A. I informed him that it might be necessary to bring suit in Alaska; though that might not really be necessary. It would depend on the circumstances. It might be brought in Washington and very likely wasn't any need to sue at all, but that in case it were necessary to bring suit in Alaska or in another State, I might want to get associate counsel.

Q. Well, what, if anything, did you put in the contract to cover that point?

Mr. COBB.—The contract speaks for itself.

Q. All right. I will ask you, then, Mr. Mathison, to look at the contract and examine it and state the clause that you claim, in the contract, covers that point?

Mr. COBB.—Well, that is going to be an opinion of the witness in the first place, whether it does or not. In the next place, it would be testifying to the contents of a paper that is already in evidence.

The COURT.—Yes; I think so. I think the objection is sustainable. The contract speaks for itself in that respect.

Q. I will ask you whether or not in drawing the contract you prepared it so as to cover that point.

Mr. COBB.—Now, the contract speaks for itself. That point [56] is not one that the contract is attacked upon at all.

Mr. ROBERTSON.—Why, you certainly do attack us on that point. I thought you did, anyway.

Mr. COBB.—No.

(Testimony of Enoch E. Mathison.)

The COURT.—They attack on the point that he was not qualified to practice law in the District of Alaska.

Mr. COBB.—Upon that point and that he didn't obligate himself in the contract to do what it was necessary for him to do and what he did agree to do. In fact, he didn't bind himself to anything he could help. That is the objection we are making.

The COURT.—Now, those remarks may be stricken out. The objection will be overruled if the question is modified.

(Question repeated by the reporter.)

The COURT.—That is a conclusion. You prepared it with intent to cover.

Q. I will ask you that question then.

The COURT.—Or for the purpose of covering it.

Q. I will ask you whether or not, in drawing this contract of March 11, 1918, Plaintiff's Exhibit No. 1 in this case, you drew it with the intent to show therein the fact that you could associate other counsel with you in case that you brought suit in the courts of Alaska or in other courts, or the courts of other States to which you had not been admitted to practice?

A. Yes, sir; that was embodied in the contract.

Q. That is, it was your intent to embody it in the contract?

A. That was my intent and his intent that it should be there.

Mr. COBB.—I ask that "his intent" be stricken out. He can't testify to somebody else's intent.

(Testimony of Enoch E. Mathison.)

Mr. ROBERTSON.—Very well. [57]

The COURT.—Yes; it may be stricken out.

Mr. ROBERTSON.—We agree that that part may be stricken out.

Q. Now, Mr. Mathison, at that time, what, if anything, did Mr. Tuppela say or do whereby he expressed, in any measure or in any way, his disagreement to the contract?

A. He didn't express any disagreement. The fact of it was—

Q. (Interrupting.) What, if anything, did he say or do to indicate to you at that time that the contract, as drawn, was agreeable to him?

A. Why, he stated that he would sign that contract and he was satisfied with it.

Q. No, did he sign the contract at that time?

A. He did sign the contract at that time.

Q. What, if anything, was concealed from him when he signed the contract?

A. Nothing whatever.

Q. At that time was the contract, or was it not, fully explained to him?

A. It was fully explained not only by myself, but Mr. Moilanen went over it word for word with him.

Q. What was Mr. Tuppela's mental condition at that time, in your opinion, from what you observed of him, as to being in a condition of mind to be able to understand it?

A. He fully understood the agreement and the contract and knew what he was doing. There is no question about that at all.

(Testimony of Enoch E. Mathison.)

Q. Now, I will ask you, Mr. Mathison whether or not, Mr. Tuppela, at any time prior to the time that the answer in this case was filed, ever, in any wise stated or told you, in any form, that the agreement did not express his understanding?

A. He never did say that in any way, at any time.
[58]

Q. Now, after the signing of the contract on March 11, 1918, what, if anything, did you do under the contract?

A. I immediately began to investigate the facts and the law applying to those and to ascertain as to what procedure I should take in recovery, recovering his claims, and in that connection I went over the probate proceedings and went to Portland to look over the statutes that we didn't have down at Astoria, and then from time to time consulted with Mr. Tuppela regarding the claims and his rights and the facts connected with them, from away back in 1905 or 1906, I think it was that he claimed it, and up to the time of his commitment to the insane asylum.

Q. Now, did you hold any consultations with him during that time?

A. Yes, sir; it was necessary to hold consultations with him very many times.

Q. How many times, after March 11, do you suppose, to the best of your recollection, that you held consultations with him concerning this matter?

A. Two or three times a week at first and then it was about once a week or so later on.

(Testimony of Enoch E. Mathison.)

Q. Well, how many times, to the best of your judgment, was it that you held consultations altogether with Mr. Tuppela after March 11, 1918?

A. Oh, I suppose between thirty and fifty times.

Q. Between how many?

A. Between thirty and fifty, from an hour to two hours at a time.

Q. Why, if at all, were such consultations necessary?

A. He didn't have any clear knowledge of the facts leading up [59] to it, to show that he had title to those properties, and it was necessary for me, after studying the papers, to consult with him, from time to time and find out what evidence he would have, to prove his claim.

Q. What, if any, conclusion did you reach in the matter, after your investigation?

A. I came to the conclusion that the sale of the property was void.

Q. The sale of the property by whom?

A. By the administrator.

Q. By whom?

A. Of the estate of Tuppela. By Mr. Mills.

Q. By Mr. Mills, as guardian of Mr. Tuppela?

A. Guardian of Mr. Tuppela. The sale was void.

Q. Yes, sir.

A. And that it could be set aside.

Q. Yes, sir.

A. I came to that conclusion and told him so, and told him also that it remained, then, to show that he really had title to the property; that if he

(Testimony of Enoch E. Mathison.)

could show proof that he had title to the property, his title remained yet in the property—the fact that it was sold by the administrator didn't amount to anything, since the proceedings of the sale were void.

Q. What was the next step that you took?

A. The next step was, after I came to the conclusion that such was the case, was to ascertain the facts as to how he could prove title to the particular properties, and it remained then to find out from the people with whom he had associated with and from the records at Sitka showing the different instruments that he had recorded there in connection with the development and improvement of the properties that he [60] claimed belonged to him.

Q. Did you make any investigation of the legal authorities or anything of that kind?

A. Oh, yes.

Mr. COBB.—We object to that as irrelevant and immaterial. He is not suing for the value of his work.

Mr. ROBERTSON.—Well, of course, if counsel maintains that it is immaterial that we prove any of the contents by performance, we're perfectly willing to let it go at that.

The COURT.—Objection overruled.

Q. Now, you can answer the question, Mr. Mathison.

A. It was necessary for me to look over legal authorities to find out just what, how I could establish the rights—

(Testimony of Enoch E. Mathison.)

Q. In other words as to what theory—

A. (Interrupting.) Yes; in case it was necessary to present it to a court of law. He himself—

Q. (Interrupting.) What other idea did you have besides recovering an equity?

A. He himself—

Q. (Interrupting.) No; you.

A. Well, one of my theories was the same as his, and that was, after having established all the facts in the case, to see the Chichagoff Mining Company and ask them to buy him out—buy him out, buy the property from him direct without any legal proceedings.

Q. What, if anything, warranted you in having such an opinion as that?

Mr. COBB.—We object to that as wholly immaterial and irrelevant.

Mr. ROBERTSON.—All right. [61]

The COURT.—Yes, I can't see the relevancy of it.

Q. Now, Mr. Mathison, what became of Mr. Tupela after March 11, 1918?

A. He was there in Astoria during that time until he left for Alaska.

Q. Was he in Astoria all the time?

A. He was out on a farm about four miles from there for a while—about a month or so.

Q. Whose farm was that?

A. That was my brother-in-law's farm.

Q. How did he hapepn to go out there?

A. I advised him to go over there and stay on

(Testimony of Enoch E. Mathison.)

the farm and drink lots of milk. He complained about his—

Mr. COBB.—I shall object to his going into that. I don't mind his going into it incidentally, but if they are going ahead and tell us how he lived out there and how much milk he drank—what has that got to do with the issues in this case? Wholly irrelevant and immaterial, if the Court please. I object to it.

Mr. MANNIX.—It might have a bearing on this one proposition, which is this; that the defendant in this case claims abandonment, or at least abandonment on the part of Mr. Mathison in carrying out the conditions of the contract, or, on the other hand, that he may have been discharged. The question of time said abandonment or discharge took place is not definitely set, and this should be material for the purpose of showing that for a period of three weeks after the execution of the contract, the parties were in close relationship; that they were doing business together and that there was no discord between them following this, [62] where he was later, and for the purpose of showing that up to the time that he left Astoria there were friendly relations between the parties, which would indicate that the plaintiff in this case was at the time working under the terms of the contract, and up until the defendant left Astoria.

Mr. COBB.—There was nothing for him to do down there. If he had investigated this thing, then the only thing to do was to bring suit. Now,

(Testimony of Enoch E. Mathison.)

what bearing it has upon that—he can testify, if he wants to. I shouldn't object to that.

The COURT.—I think that it has some bearing—

Mr. COBB.—How's that?

The COURT.—I think it has some bearing that may be material on the question of time, when it was he came north. That is the only thing.

Q. Just state, Mr. Mathison, how did it happen that immediately after making this contract of March 11, 1918, neither you nor Mr. Tuppela came north, to Alaska?

A. The reason was this: Doctor Coe, the doctor at the sanitarium, Morningside Sanitarium, advised us that it would be his advice not to send Tuppela up to Alaska at once, or for a while; that his physical condition wouldn't stand it, and that it would be best to keep him here in a mild climate for some time; that his condition wasn't such that he would be justified in going to Alaska. For that reason I advised him to stay there in Astoria until he had substantially recovered.

Q. Now, at that time did you have any plan in mind of either you or Mr. Tuppela coming to Alaska? [63] A. Yes, sir.

Q. For what purpose?

A. For the purpose of investigating, making a preliminary investigation as to those particular rights which I have stated, that he had in the claims.

Q. Why did you think of making an investigation in Alaska? A. Sir?

(Testimony of Enoch E. Mathison.)

Q. What—How did it happen that you wanted to make an investigation in Alaska?

A. All the facts leading to the—facts or evidence—leading to the ownership of those claims were here, as I understood it and the men that were his former partners were here, he thought, although he wasn't sure.

Q. What men were they?

A. Mr. Peterson was one of his partners and W. R. Hanlon.

Q. You remember any others that he mentioned?

A. Bauer.

Q. What?

A. A man by the name of Bauer. I can't recall his initials.

Q. Bauer, Peterson and Hanlon?

A. Those were his partners.

Q. Did Mr. Tuppela tell you about them at that time? A. Yes, sir.

Q. State for what, if any other purpose besides investigating you wanted to come to Alaska for?

A. He claimed that he had a cabin at Sitka and that he had all his personal effects and papers in that cabin.

Q. What did he want to do with his personal effects and papers?

A. The papers, he claimed, showed what improvements he had made on the different claims and would go to prove title to them. [64]

Q. For what, if any reason did you want to know about these witnesses, these three men that you have mentioned, before you instituted suit?

(Testimony of Enoch E. Mathison.)

A. That was absolutely necessary in order to draw a complaint, if it developed that a suit was necessary.

Q. You mean to say that you thought it possible that a suit might not be necessary?

A. Oh, yes; I have settled lots of claims without suits.

Q. Why did you want to know these things if you felt a suit would be necessary before you went into it further? A. What was that?

Q. Why did you want to find out about these witnesses and papers in any event, whether or not you brought suit or took some other course?

A. Well, I wanted to know the facts as to his title to the properties, and then after I had the facts I wanted to see the witnesses themselves, and the records in the recorder's office, and then I could form an idea of just what procedure I should take, and if the claims were such that they were undisputed and no one could deny that, as it appeared to me at that time, it would be proper for me to go to the Chichagoff Mining Company and present them with the facts and say, "These are the facts. Are you going to settle with me?" And I believe that they would have settled. That is my opinion. If they would not settle, then the last course would have been to the court. That is my practice. I don't know—some attorneys might not practice that way.

Q. Why didn't you come up yourself in the spring of 1918?

A. I had prepared to come in July—

(Testimony of Enoch E. Mathison.)

Q. Why didn't you come prior to July? [65]

A. (Continuing.) —1918, and had made reservations, but at that time—it was during war time—I was on the legal advisory board of the local draft board there and I had two cases in the Supreme Court in the State of Washington, and one in the State of Oregon. Then, of course, I was alone in the office and had my hands full all the time, and I had found out from the steamship companies, by writing, and figuring it out, that it would take about two months to make the trip to Juneau, Sitka and Chichagof Island, because of the different steamboat connections.

Q. What, if anything, did you do at that time about making reservations?

A. I made reservations to come here, but on finding out that it would take that long a time—and, of course, it was necessary that I should spend probably four or five days here, maybe a week at another place, in order to get the witnesses, find out where the witnesses were and interview them as to their knowledge of things, I saw that my business was such that it was impossible for me to come at that time.

Q. Did Tuppela come at that time?

A. Well, Tuppela was desirous of coming and he was in a pretty good healthy condition—

Q. (Interrupting.) Well, didn't he make a start to come?

A. (Continuing.) I made the reservation; the transportation was made by the Government. Doctor Coe arranged for that.

(Testimony of Enoch E. Mathison.)

Q. Did Tuppela make a start to come up?

A. And he left Astoria on the sixth of July, to go to Portland and get his ticket there on the seventh—the following day—and then go from there to Seattle. I gave him some money. I think it was— [66]

Q. Do you recall how much?

A. Yes. Sixty dollars at that time. He was gone, I guess about a week or so and he came back.

Q. Had he been to Alaska? A. No.

Q. Where had he been?

A. He said he went to Portland and didn't want to go to Alaska yet.

Q. Didn't want to go to Alaska yet?

A. No; he told me that—

Q. (Interrupting.) What did he tell you at that time?

A. He told me that he had a friend who was going up there after the fishing season and that he would—

Mr. COBB.—We object to that as irrelevant and immaterial. Can't see what it possibly—

Mr. ROBERTSON.—(Interrupting.) Counsel claims he didn't come up to Alaska, so we're trying to show why he didn't come to Alaska.

Mr. COBB.—Why should Tuppela come to Alaska when counsel failed to come with him, as it was arranged? He couldn't do anything up here by himself. Ask him why he didn't come.

The WITNESS.—He said he didn't—

Mr. COBB.—(Interrupting.) There's no complaint about Tuppela not coming up in July.

(Testimony of Enoch E. Mathison.)

The COURT.—Objection sustained.

Mr. MANNIX.—If the Court will pardon me for making a statement respecting this question. I take it that in every contract, it is implied by law that the client shall furnish the attorney with all the data necessary to proceed with the case. I take it that that is elementary law, that, whether [67] it is stated in the contract or not, the law implies agreement on the part of the client to furnish the necessary data. The evidence shows in this case, so far, that there was data in the way of papers, and documents here in Alaska which it was necessary for the attorney to have before he could proceed with the case. For that reason, I think it would be material to show, at this time, that the client, upon whom that duty rested, didn't fulfil his duty to this extent; that any neglect on the part of the client should not be charged to the plaintiff in this case.

The COURT.—The reason he didn't come up; what he stated as his reason; the fact that he didn't come up is shown, and that's all that is necessary.

Q. Now, then, Mr. Mathison.

A. I might, in this connection, state, in answer to that previous question, that before he left Astoria, I instructed him, and it was agreed that he should come here to Alaska and locate these witnesses, get their names and addresses and have personal interviews.

Q. That is, before he left?

A. Yes. And those papers that he had in his cabin in Sitka, to send them over to me.

(Testimony of Enoch E. Mathison.)

Q. Was that in July or August?

A. That was in July.

Q. Before he started over to Portland?

A. Yes.

Q. To come to Alaska?

A. It was in August when he finally left there.

Mr. ROBERTSON.—We had, in connection with that testimony of Mr. Mathison's that he gave a few moments ago, relative to a telegram sent in the name of August Nikula, the original [68] exhibits, which seem to have been unfortunately mislaid since we looked at them this morning. We can't find them and the Clerk can't find them. Now, there is a certified copy in the printed record and I would like to call the witness' attention to this in the record and ask him whether or not he can testify—

The COURT.—(Interrupting.) What exhibits are they?

Mr. ROBERTSON.—They are exhibits under which he got these—shows how he got these certified copies of the guardianship and insane proceedings, sale proceedings at Sitka.

Mr. COBB.—Well, now, we shall object to that?

Mr. ROBERTSON.—Do you object on the ground that it is not the best evidence?

Mr. COBB.—Not the best evidence and the situation is this: In the trial of the case of Tuppela against the Chichagoff Mining Company, the record shows that they introduced, the Chichagoff Company did, a telegram that they said was sent to August Nikula. Now, without producing the

(Testimony of Enoch E. Mathison.)

original—Further, he claims that those were his telegrams and he was using a forged name.

Mr. ROBERTSON.—He explained why he used it.

Mr. COBB.—How is that?

Mr. ROBERTSON.—He explained why he used it.

Mr. COBB.—I know, but it isn't his name. Now they want to take that record and have him identify it. If he sent these telegrams, he ought to have the originals.

The COURT.—Ought to have the originals—?

Mr. COBB.—Ought to have the original replies at any event.

The WITNESS.—If your Honor please, may I explain?

The COURT.—What is the materiality of this?
[69]

Mr. ROBERTSON.—Well, of course, it simply corroborates his statement that he did it—

The COURT.—Objection sustained.

Mr. ROBERTSON.—For the purpose of the record, we wish to make an offer.

The COURT.—You may make your offer.

Mr. ROBERTSON.—We want to make this offer—well, we withdraw the offer, if the Court please.

Q. Now, Mr. Mathison, when did Mr. Tuppela come to Alaska?

A. He left Astoria a few days after the fishing season. That was about the twenty-eighth or ninth of August.

(Testimony of Enoch E. Mathison.)

Q. What year? A. 1918.

Q. Did you provide him with any funds at that time in order to—

A. I gave him a few dollars. I don't recall. I think it was twenty-five dollars.

Q. Did he have means with which to come here?

A. Yes.

Q. Did he have transportation?

A. He had something like \$300; he said—

Q. Something like \$300?

A. Yes; due him from the Alaska miner who was then fishing in Astoria.

Q. Well, did he have funds to come to Alaska?

A. Yes, sir.

Q. Now, prior to his coming to Alaska, what, if any, advice did you give him relative to this particular matter that you have in the contract?

A. I advised him to locate these three witnesses and any other witnesses that he thought would substantiate his claim and [70] get their names and addresses and send them to me as well as to send those papers that he said he had in Sitka, and also that he should not enter into any negotiations with the Chichagoff Mining people or with Mills until he had consulted with me, and to sign no papers, as I believed they would naturally want to get in touch with him and want him to assign his rights in the property for a nominal sum.

Q. What, if anything, was he to do if he located the witnesses?

A. He was to send me their addresses and send me the papers, and when I had received those

(Testimony of Enoch E. Mathison.)

papers as well as the addresses of the men, then I was to take steps to get in touch with them. The purpose of that was to find out whether they were in Juneau or Seattle or Sitka or some other place, so that it wouldn't necessitate my going back and forth to Sitka and back to the States and then back again. If he could get their addresses I could go and consult with them, find out what they would testify to.

Q. What, if anything—how were your relations—you and Tuppela—at the time he left for Alaska; I mean with reference to being friendly or unfriendly? A. They were friendly.

Q. Well, at that time was he or was he not still coming to consult you about this case?

A. He saw me every week.

Q. Now, how were you—were you willing or unwilling to proceed with your contract with Tuppela?

A. I was willing; more than willing. I wanted to because I could see that he had lost a right in a very valuable property. I had had some experience in the same line of cases some years before. [71]

Q. And you were anxious to participate in it, if for no other reason? A. I was.

Q. Now, after he left Astoria, Mr. Mathison, when did you next hear from Mr. Tuppela?

A. From Tuppela?

Q. Yes, sir.

A. Never heard from him directly or indirectly, excepting I heard from parties then that he had come to Sitka. The first time I heard was in De-

(Testimony of Enoch E. Mathison.)

ember, that he was in a hospital with the flu.

Q. When did you think that you ought to first commence to hear from him again?

A. Why I hoped to hear from him by November; at least by November, 1918.

Q. Well, now, at that time that he came up in the fall, why didn't you come with him?

A. In the fall?

Q. Of 1918.

A. I couldn't come for the same reason—that I had two Supreme Court cases then in the courts which were pending and I was busy with those. Besides there were other things, and I believed first that it was necessary to get these facts first before I could intelligently proceed with it, and he could easily furnish these facts for me and he was willing to do it and he was able to do it, and that was the cheapest way for him and the cheapest for myself and a surer way.

Q. How about your readiness, too, to go ahead with it? A. How is that sir? [72]

Q. How about your readiness, were you ready to go ahead with it?

A. Oh, yes; as soon as I got these facts I was ready to go ahead with it.

Q. By this time had you established, in your own mind, the proper remedy for him?

A. Yes, I had. I had established in my own mind, if the facts were as stated and as I believed them to be.

Q. Now, when you didn't hear from him after he had come to Alaska, what, if anything, did you do?

(Testimony of Enoch E. Mathison.)

A. I saw— After I came back to the office in the latter part of November—

Q. (Interrupting.) Where had you been, when you say you came back to the office?

A. I was sick with the flu for a month, pretty near a month.

Q. In the fall of 1918? A. In the fall of 1918.

Q. Yes, sir.

A. And when I came back to the office, I saw Mr. Nikula and I asked him whether—

Q. (Interrupting.) Well, just state generally.

A. Since I didn't hear from Mr. Tuppela, I asked him whether he had heard from him, because he was also a friend of Mr. Tuppela and one of the parties who aided in getting him from the Morningside Sanitarium, and he said that he had heard that Tuppela—

Mr. COBB.—I object to that as hearsay.

Mr. ROBERTSON.—Yes, don't— Well, anyhow, what did you do?

A. I wrote. After finding no letters from him in the office, I wrote to Sitka. [73]

Q. Whom did you write to?

A. To John Tuppela.

Q. In what language did you write the letter?

A. Finnish language.

Q. Did you keep any copy of it?

A. No; I wrote it in pen.

Q. You mean, you wrote it in longhand?

A. Yes.

Q. What is your custom when you write in the Finnish language? A. Write with a pen usually.

(Testimony of Enoch E. Mathison.)

Q. Why did you write this letter in Finn, the Finnish language?

A. That was the easiest language for him to understand and read.

Q. And you didn't keep any copy of it?

A. No; I didn't.

Q. Did the letter ever come back to you?

A. No, sir.

Q. Did it have any postage on it?

A. Oh, yes; yes.

Q. Did it have sufficient postage to take it to Sitka? A. Yes, sir.

Q. Do you remember what you stated in that letter? A. I asked him—

Mr. COBB.—I object to that answer.

Q. Answer yes or no. A. Yes.

Q. Just state what you wrote to Mr. Tuppela at that time?

Mr. COBB.—I object to that on the ground that it is not the best evidence and we have no opportunity to produce that letter. Counsel served us this morning, about half-past [74] nine o'clock with a notice to produce that letter. They knew that for more than a year Mr. Tuppela had been insane and was confined in a hospital. It was the merest chance that we had it here, and that is not the proper way to get at it. They should have given us such notice as under the circumstances would have enabled us to produce it, if any such letter was ever written.

Mr. ROBERTSON.—We're not trying to hasten the counsel, but we asked counsel for half a dozen

(Testimony of Enoch E. Mathison.)

documents which are in his possession as trustee or Mr. Winn's as guardian—

Mr. COBB.—(Interrupting.) We wouldn't, either as trustee or as guardian, be likely to have, or be legally entitled to the possession of a private letter written in 1918. All the documents that I have as trustee I have produced here. Mr. Winn, of course, has nothing of that kind.

Mr. ROBERTSON.—We'll ask that counsel produce it in the morning, then.

Mr. COBB.—How is that?

Mr. ROBERTSON.—We ask that you produce it in the morning then,

Mr. COBB.—I haven't got it. John Tuppela has got it, if there ever was such a document.

Mr. ROBERTSON.—I thought you were arguing that on account of the shortness of time that you—

The COURT.—(Interrupting.) The argument of counsel is that he should have been entitled to three or four months' notice so that he could go to Tuppela and ask him if he had the letter.

Mr. COBB.—They knew that Mr. Tuppela was in an asylum at Minneapolis. [75]

The COURT.—Objection overruled.

Mr. COBB.—We except.

(Question repeated by the reporter.)

A. Substantially the contents was as to whether he had found these men and whether he had found the papers and to write me; then I asked him whether or not he had been sick in the hospital, as I had

(Testimony of Enoch E. Mathison.)

heard that he had been. That was substantially the contents of it.

Q. Did you get any reply to that letter.

A. I did not.

Adjourned until Thursday, November 9, 1922, at 10 o'clock A. M.

Thursday, November 9, 1922.

Court met pursuant to adjournment at 10 A. M.

ENOCH E. MATHISON on stand.

Direct Examination (Resumed).

(By Mr. ROBERTSON.)

Mr. ROBERTSON.—Before proceeding with the examination this morning, I would like to ask at this time if counsel has the reports and accountings made to Mr. Tuppela, or to Mr. Cobb as Mr. Tuppela's trustee, or to Mr. Winn, as his guardian, showing the credits from the properties conveyed to Mr. Tuppela by the Chichagoff Mining Company.

Mr. COBB.—I stated to counsel yesterday, and I thought it was understood. I could give you the results, if that will suit you. I suppose you want to know the amount that has been paid since the settlement?

Mr. ROBERTSON.—Yes, sir.

Mr. COBB.—I can give you the amount of that.
[76]

The COURT.—You want the details of it?

Mr. ROBERTSON.—Of course, I would like to know from what interest it appears that these figures Mr. Cobb gives me come from—as to what

(Testimony of Enoch E. Mathison.)

proportion there is in issue in this case; as to whether a quarter or a half interest was conveyed in the Over-the-Hill claim to Mr. Tuppela, or a quarter interest, and, of course, I would like to know and have it specified as to what these amounts, these credits, what interests they represent—whether they represent a quarter or a half interest.

Mr. COBB.—The figures I can give you. I can give you the exact figures, to the cent. The figures represent the aggregate amount that has been paid the present owners of an undivided half interest in the Over-the-Hill claim. That is about the only producing claim.

Mr. ROBERTSON.—Yes, sir.

Mr. COBB.—And show the expenses that have been paid, that we have been put to. We have leased the ground to the Chichagoff Mining Company, as you know, and the amount which I have received as trustee for Tuppela and the amount which—

Mr. ROBERTSON. — (Interrupting.) When could you have those here?

Mr. COBB.—I can get them at noon.

Mr. ROBERTSON.—I would also like to know whether or not you found the paper denominated as counter-affidavit, in which you state—

Mr. COBB.—(Interrupting.) No; I don't think that was filed. I haven't got that. [77]

Mr. ROBERTSON.—Have you also brought in the original record of accounting between John Tuppela—

(Testimony of Enoch E. Mathison.)

Mr. COBB.—(Interrupting.) Yes. You mean the settlement?

Mr. ROBERTSON.—Yes; the agreement— I'll show you the copy.

Mr. COBB.—I believe that's a copy.

The COURT.—That copy will show it?

Mr. ROBERTSON.—The reason that I am asking counsel about it is that I am prepared to put Mr. Faulkner on the stand to prove the contents of this copy, unless Mr. Cobb is willing to admit the original that was put in evidence. That is why I have Mr. Faulkner up here.

Mr. COBB.—This is a copy. You got this from Mr. Faulkner, I presume. This is his handwriting. I might have the original here if you want it.

Mr. ROBERTSON.—I would ask, at this time, if the Court please, permission to take Mr. Mathison off the stand temporarily and call Mr. Faulkner.

The COURT.—To prove that?

Mr. ROBERTSON.—Yes.

The COURT.—Has it been admitted by the counsel or the other side whether it is a true copy?

Mr. COBB.—What is that?

The COURT.—Has it been admitted by you that it is a true copy?

Mr. COBB.—What do you want to prove by Mr. Faulkner?

Mr. ROBERTSON.—I want to put it in evidence.

Mr. COBB.—Well, put them in evidence.

Mr. ROBERTSON.—And also the counter-affi-

(Testimony of Enoch E. Mathison.)

davit. Look at the back of it and see if that is a true copy.

Mr. COBB.—I presume that it is a true copy. Whether it was [78] ever filed in the case or not, I am not sure.

The COURT.—You admit it to be a true copy?

Mr. COBB.—How is that?

The COURT.—You admit it to be a true copy—the affidavit?

Mr. COBB.—It is a true copy of an affidavit that I drew for Mr. Tuppela to sign. I have no independent recollection whether it was actually signed or not. It was not filed so far as the files show, and I have no recollection about it definitely except that I have a faint recollection that that was withdrawn because there was an error in the latter part of it, but I am not sure about that. So far as that is concerned, it may be admitted as the original.

The COURT.—It may be admitted then, without proving it?

Mr. COBB.—So far as Mr. Faulkner being detained here—

The COURT.—Now, wait a moment. You have admitted these copies to be introduced in evidence—

Mr. COBB.—(Interrupting.) Subject to such objection—

The COURT.—(Continuing.) Are true copies?

Mr. COBB.—Yes.

The COURT.—Well, they may be admitted, subject to such objection as you may make as to their materiality.

(Testimony of Enoch E. Mathison.)

Mr. COBB.—Yes. So far as the original settlement is concerned, they have the original—

Mr. ROBERTSON.—(Interrupting.) I have the original that was handed to us now.

The COURT.—Let them be marked for identification.

Mr. ROBERTSON.—Now, for the purpose of the record, I hand you for identification, counter-affidavit of John Tuppela, case No. 1841—A, John Tuppela vs. the Chichagoff Mining Co., a corporation, which, as I understand it, by agreement of counsel is to be considered to be a true copy of the original. [79] I also hand you a copy of the agreed settlement of accounting in case No. 1841—A, John Tuppela vs. the Chichagoff Mining Company, a corporation—

Mr. COBB.—Well, now, there's the original.

Mr. ROBERTSON.—Oh, I beg your pardon. I hand you the original copy, or one of the original copies of the agreed settlement of accounting, case 1841—A, John Tuppela, plaintiff, vs. the Chichagoff Mining Company, a corporation, defendant.

Q. Now, Mr. Mathison, as I recall, yesterday, where we stopped in your testimony, you had stated that you had written a letter to Mr. Tuppela in the fall of 1918 in the Finnish language, to which you had received no reply, and stated the contents. Now, when is the next time after that that you heard of Mr. Tuppela?

The COURT.—What is the question?

Mr. ROBERTSON.—When is the next time that

(Testimony of Enoch E. Mathison.)

he heard of Tuppela or from Tuppela, if at all?

A. I did not hear directly from Tuppela, but—
The COURT.—Well, that's it.

Q. Did you hear of him?

A. I heard of him; yes.

Q. What, if anything, did you then do as a result of what you heard at that time?

A. I wrote him a letter, asking him whether or not he had retained an attorney.

Q. When was it you wrote him this letter, approximately, as near as you can recall it at this time?

A. It was about the first of March?

Q. What year? [80] A. 1919.

Q. In what language did you write to him?

A. Finnish language.

Q. How did you happen to come to write him in the Finnish language?

A. The same reason that I did formerly. He couldn't read intelligently the English language.

Q. Did you retain any copy of that letter?

A. No; I did not.

Q. What was it written in, typewriter or—

A. Pen and ink.

Q. Pen and ink? A. Yes.

Q. By yourself? A. By myself.

Q. Where did you address that letter?

A. To Juneau.

Q. To John Tuppela himself?

A. To John Tuppela.

(Testimony of Enoch E. Mathison.)

Q. Was the letter returned to you by the post-office? A. It was not.

Q. Did you have postage on it?

A. I did, sir.

Q. What was the contents of the letter, as near as you can recall?

Mr. COBB.—I make the same objection to that as to the other—that it is not the best evidence. There has been no such notice made to produce it that would have enabled us to produce such original, if any such original ever [81] existed or was received by Tuppela.

A. What was that—the contents?

Q. Yes; to the best of your recollection.

A. To the best of my recollection, it was to inquire of him if it were true that he had retained another attorney in Juneau and to let me know at once.

Q. How did you happen to write to him to that effect? A. I had—

Mr. COBB.—We object to his reasons—it's immaterial—as to why he wrote him. That would be purely argumentative.

The COURT.—He may answer; objection overruled.

A. I had been informed by a fisherman—

Mr. COBB.—Well, now, if it's based upon what he heard, it's going to be hearsay. That is the main basis of my objection to it.

Q. Don't state what, if any, statements were made to you by other parties.

(Testimony of Enoch E. Mathison.)

The COURT.—Not as a statement of fact, but as to his reasons for writing.

A. Well, I was informed. That is a proper answer. Well, I was informed by a fisherman—

Mr. COBB.—Do I understand that the Court sustained the objection as hearsay?

The COURT.—I'll allow him to answer not as a fact that the information was true, but as to the reason that he wrote the letter. You may answer.

A. The reason I wrote the letter is that I got information from a fisherman that he had retained another attorney in Juneau.

The COURT.—The jury will not take that as a fact that he retained another attorney, but simply as to the reason for [82] his writing the letter.

Mr. ROBERTSON.—Certainly; we don't consider this competent proof.

The COURT.—I want to instruct the jury on that point.

Q. Now, Mr. Mathison, did you receive any reply to that letter? A. I did not.

Q. Now, that was about, you say, about what time in 1919?

A. That was in the spring of 1919; to the best of my recollection, it was about the first part of March.

Q. Now, after that, some time after that, did you receive some information from Alaska relative to Mr. Tuppela? A. I received a letter from—

Q. From whom?

A. From one J. H. Cobb, some time in the summer of 1919.

(Testimony of Enoch E. Mathison.)

Q. Some time in the summer of 1919?

A. Yes, sir.

Q. I hand you this letter and envelope, Mr. Mathison, and ask you to state whether or not that is the letter that you received and the envelope in which it came?

A. Yes, sir; this is the identical letter and envelope.

Q. I will offer the letter and envelope in evidence.
Mr. COBB.—No objection.

The COURT.—It may be received and filed and marked.

(Whereupon said letter and envelope were marked as one exhibit and numbered Plaintiff's Exhibit No. 5.)

Mr. ROBERTSON.—Letter-head denominated
"J. H. Cobb, Juneau, Alaska, July 17, 1919.

Plaintiff's Exhibit No. 5.

"Mr. Enoch E. Mathison,

"Astoria, Oregon.

"Dear Sir:

"Mr. John Tuppela says he left with you, in March last, a lot of papers pertaining to certain mining claims near [83] Chichagof and Sitka, Alaska. These papers he now needs. Will you please send them either to me or to John Tuppela, Juneau, Alaska.

"Very truly yours,

"J. H. COBB."

And on the envelope "J. H. Cobb, Juneau, Alaska; Mr. Enoch E. Mathison, Astoria, Oregon."

(Testimony of Enoch E. Mathison.)

Now, did you know Mr. Cobb at that time, Mr. Mathison? A. No, sir.

Q. Had you ever met him? A. No, sir.

Q. Had you ever heard of him? A. No, sir.

Q. Did you know in what business, if any, he was engaged? A. No, sir; I did not.

Q. You had no information whatsoever as to his business or occupation?

A. No, sir; I did not. No one told me—

Q. Now, what did you do in reply, if anything, to that letter? A. I wrote to Tuppela at once—

Q. (Interrupting.) You wrote to—

A. (Continuing.) Or within a day or so.

Q. You wrote to John Tuppela?

A. Yes; stating—

Q. (Interrupting.) After you received this letter from Mr. Cobb you wrote to John Tuppela; is that right? A. Yes.

Q. What did you write to Mr. Tuppela?

A. I stated— [84]

Mr. COBB.—We object to that, for the same reason as to the other. We make the same objection. They have given us no such notice—

The COURT.—(Interrupting.) Objection overruled.

A. I—

Q. Wait a minute. You say you did write, then to Mr. Tuppela? A. I did.

Q. About what time did you write him, as best you recall now?

A. Why, shortly after I received this letter—

(Testimony of Enoch E. Mathison.)

probably the same day or thereafter.

Q. Where did you address your letter to?

A. Juneau, Alaska.

Q. Was there any postage on the letter?

A. Yes, sir.

Q. Did the letter ever come back to you?

A. It did not.

Q. How did you write the letter, Mr. Mathison—in English or Finnish?

A. In the Finnish language.

Q. And on the typewriter or by pen and ink?

A. Pen and ink.

Q. Did you keep a copy of the letter?

A. No; I did not; at least, I could not find any.

Q. You could not find any? A. No, sir.

Q. State at this time, as near as you can recollect what the contents of the letter was?

A. As near as I can recollect, now, it was that I stated I had received a letter from J. H. Cobb, of Juneau, asking for some papers, and that he had never sent me the papers that [85] *that* he went after, and I again asked him whether or not he had retained an attorney here, as I had been informed previously and had written him previously to let me know so that I could act accordingly. That is the substance of the letter.

Q. Did you ever receive any reply to that letter?

A. I did not, sir.

Q. Now, then, Mr. Mathison, as I understand you to say, during all this time you had not heard from Tuppela direct? A. No; I did not.

(Testimony of Enoch E. Mathison.)

Q. Now, after this did you make any further inquiries in an endeavor to locate Tuppela?

A. Yes; I did.

Q. Do you recall when that was?

A. That was during the summer of 1919.

Q. What did you do then?

A. I ascertained from people that came from here as to whether or not he had retained an attorney.

Mr. COBB.—Now, we object to that as hearsay.

Mr. COBB.—We're not endeavoring to prove the fact, the conceded fact, that in 1919, he had attorneys and had this suit in court. All we're trying to prove is what Mr. Mathison was doing to ascertain—

The COURT.—(Interrupting.) Yes; objection overruled. It was admitted that he retained an attorney. You may proceed.

A. I was informed that he had an attorney here and had the case, trial in the court.

Q. What did you do, if anything, after learning that information?

A. Of course, I couldn't do anything, so far as that case was [86] concerned. I didn't feel it was compulsory—

The COURT.—(Interrupting.) Well, now, he simply asked you what you did.

A. Well, after not hearing from Tuppela and the matter being indefinite, I wrote then to the Clerk of the Court here.

Q. To the Clerk of this Court?

(Testimony of Enoch E. Mathison.)

A. Yes; to find out the status of the case, and at that time—

The COURT.—(Interrupting.) Well, that's all.

Q. I hand you here, Mr. Mathison, a letter dated February 20, 1920, and ask you to state whether or not that is your signature. Is that your signature to that letter? A. Yes; that's the letter.

Q. Is that the letter that you state you wrote to the clerk in February, 1920? A. Yes, sir.

Mr. ROBERTSON.—I will offer that in evidence.

Mr. COBB.—No objection. I want the answer to go in with it.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 6.)

The COURT.—You may read it to the jury. Never mind passing it around.

Mr. ROBERTSON.—(Reads.) "Law Offices of Enoch E. Mathison, Astoria, Oregon, February 20, 1920.

Plaintiff's Exhibit No. 6.

"Clerk, U. S. District Court,

"Juneau, Alaska,

"Dear Sir:

"Would you kindly inform me whether or not there is a case pending in your court wherein John Tuppela is plaintiff against a certain mining company at Chichagoff, or Sitka, Alaska, or whether he has had any case pending there within the last two years or so. [87]

"Thanking you for an early reply, I remain,

"Respectfully yours,

"ENOCH E. MATHISON."

(Testimony of Enoch E. Mathison.)

Q. Now, Mr. Mathison, I hand you a letter here, did you receive any reply to that letter?

A. I received a reply from the Clerk of the court, or the Clerk's office.

Q. Is that the reply you received from the Clerk (handing letter to witness)?

A. Yes; that is the reply.

Mr. ROBERTSON.—I will offer that in evidence. Any objection, Mr. Cobb?

Mr. COBB.—What is that?

Mr. ROBERTSON.—You have no objection to my offering this letter in evidence?

Mr. COBB.—Oh, no; in fact, I rather want it in.

(Whereupon letter mentioned was received in evidence and marked Plaintiff's Exhibit No. 7.)

Mr. ROBERTSON.—On the letter-head of the (reads): "Department of Justice, United States District Court, First Division, District of Alaska, Clerk's office, Juneau, March 3, 1920.

Plaintiff's Exhibit No. 7.

"Enoch E. Mathison, Esq.,

"Attorney at Law,

"Astoria, Oregon.

"Dear Sir:

"Your letter of February 20th at hand, and in reply to your inquiry therein, I would say that an equity suit was begun on May 10, 1919, by John Tuppela, plaintiff, against the Chichagof Mining Company, a corporation, defendant. The plain-

(Testimony of Enoch E. Mathison.)

tiff's attorneys are John R. Winn and J. H. Cobb, both of Juneau. The defendant is represented by H. L. Faulkner of Juneau, and former Supreme Court Justice [88] O. G. Ellis, of Tacoma, Wash.

"The relief prayed for in the complaint was, among other things, that plaintiff be decreed to be the owner of an undivided one-half interest in certain lode claims situated at or near Klag Bay, on the west side of Chichagof Island, Alaska; that an accounting be rendered plaintiff for the gold extracted from these claims, and that, pending the final determination of the suit, a temporary injunction issue.

"The trial began on November 20, 1919, was concluded on November 29th, and taken under advisement.

"On February 25th, 1920, a decree was entered, dismissing the complaint.

"Yours truly,

"J. W. BELL,

"Clerk.

"By John T. Reed,

"Deputy."

Q. Now, Mr. Mathison, at that time, did you write to anyone else in Juneau, the time that you last wrote to the Clerk? A. I did.

Q. Who else did you write to?

A. To J. H. Cobb.

Q. To Mr. Cobb. This Mr. Cobb here?

A. I suppose that's the same Cobb.

Mr. ROBERTSON.—Have you the original of

(Testimony of Enoch E. Mathison.)

that letter, Mr. Cobb? I made a demand upon you to produce it.

Mr. GROVER WINN.—What date?

Mr. ROBERTSON.—February 20, 1920.

Mr. COBB.—Yes. [89]

Mr. ROBERTSON.—May I have it, please?

Mr. COBB.—Yes.

Q. I will ask you to state whether or not that is the letter that you wrote to Mr. Cobb at that time, Mr. Mathison—the original letter?

A. Yes, sir; that's the letter.

Mr. ROBERTSON.—I will offer that in evidence.

Mr. COBB.—No objection.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 8.)

Mr. ROBERTSON.—Letter-head of "Enoch E. Mathison, Attorney at law, Spexarth Building, Astoria, Oregon.

Plaintiff's Exhibit No. 8.

"February 20, 1920.

"Mr. J. H. Cobb,

"Juneau, Alaska.

"Dear Sir:

"Last summer you wrote me a letter regarding the whereabouts of John Tuppela, and asking for certain papers he may have left with me. The letter was lost and I have just found the same. Would you kindly let me know whether he is in Juneau or not, or whether you know of his where-

(Testimony of Enoch E. Mathison.)

abouts, as he has some matters pending here which he had neglected to complete.

“Respectfully yours,
“ENOCH E. MATHISON.”

Q. Now, what, if any, answer or reply did you receive from Mr. Cobb or anyone else to that letter, Plaintiff's Exhibit No. 8, that you wrote to Mr. Cobb on February 20, 1920?

A. I received no reply. [90]

Q. Did you ever receive a reply to that letter, Mr. Mathison? A. No, sir.

Q. Now, then, did you at any time after that again take this matter up with Mr. Tuppela?

A. I think it was the same year, in July, I believe.

Q. July, 1920? A. Yes, sir.

Mr. ROBERTSON.—I now ask if counsel has the original letter written on July 7, 1920, by Mr. Mathison to Mr. John Tuppela. (Letter produced by Mr. Cobb.)

Q. I call your attention to this letter, on a purported letter-head of Mathison & Mannix, under date of July 6, 1920, and ask you to look at it, Mr. Mathison, and state whether or not that is the letter you wrote to Mr. Tuppela on July 7, 1920?

A. Yes, sir; this is the letter.

Mr. ROBERTSON.—I offer that letter in evidence.

Mr. COBB.—No objection.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 9.)

Q. Referring to this, Plaintiff's Exhibit No. 9,

(Testimony of Enoch E. Mathison.)

Mr. Mathison, I call your attention to the fact that it was addressed to Mr. Tuppela at Juneau—that is, on the letter. Do you know whether or not the envelope was mailed to Mr. Tuppela at Juneau?

A. Yes, sir; the envelope was addressed to John Tuppela by registered mail, with a return card demanded.

Q. At Juneau? A. Juneau, Alaska.

Mr. ROBERTSON.—Written on a letter-head of Mathison & Mannix (Reads): [91]

Plaintiff's Exhibit No. 9.

“MATHISON & MANNIX,

“Attorneys at Law.

“Astoria, Oregon, July 7, 1920.

“Mr. John Tuppela,

“Juneau, Alaska,

“Dear Sir:

“Information has been brought to me to the effect that you were successful in the legal proceedings instituted by you against the Chichagof Mining Corporation, arising out of matters in connection with the contract you entered into with me, herein-after more particularly mentioned. Previously, after receiving information that you probably were located at Juneau, Alaska, I wrote you several letters to substantiate that fact, but received no reply from you. I have endeavored to get in touch with you since the summer of 1918, so that I could proceed with the litigation, but no one seemed to know where you went to. On March 3, 1920, in answer

to my inquiry, I received a communication from the Clerk of the United States District Court at Juneau, Alaska, to the effect that you had started these proceedings, but outside of these two sources of information I have not received any information as to what you were doing in the premises.

“I am writing this letter for information. I call your attention at this time specifically to the fact that on the 11th day of March, 1918, you entered into a contract with me, the same being in writing, and by the terms of said contract you retained me as your attorney to prosecute your claims against this particular corporation, or any other parties holding adverse to you, in the matter of those certain mining claims which appear to have been the subject-matter of the litigation referred to hereinabove. By the terms of this [92] agreement I was empowered to proceed with all matters pertaining to your interest in said mining claims, and the rate of compensation which I was to receive was clearly set forth in said contract, you retaining a copy of the same. At this time I respectfully request that you examine said contract and then communicate with me as to what you will do in the matter of compensating me for the work which I did under said contract and for the damage which I suffered because of the breach of said contract on your part.

“I do not propose in this letter to recite the work which I did in your behalf after the execution of said contract as that is beyond the purview of this

(Testimony of Enoch E. Mathison.)

letter, and you personally know concerning the large amount of the work which I did on your behalf, but I wish at this time to state that I am able to conclusively show that I was at all time ready, able and willing to fully carry out all the terms of said agreement to be kept and performed on my part, and that you, shortly after the execution of this agreement, failed to keep your part of the same and left for parts unknown to me, thus rendering it impossible for you to properly conduct your case in accordance with the terms of said agreement.

“As stated before, I will not undertake to rehearse all the facts in relation to the matter at this time, but request that you give this matter your early and earnest consideration to the end that any litigation may be avoided and a prompt and satisfactory settlement arrived at.

“Trusting to hear from you at an early date, I remain,

“Very truly yours,

“ENOCH E. MATHISON.”

Q. Now, did you receive any answer to that letter from him? A. I did not. [93]

Q. Did you receive any answer from anybody else to that letter?

A. I did, from J. H. Cobb.

Q. I hand you a letter here and ask you whether or not that is the answer you received from Mr. J. H. Cobb at that time?

A. Yes, sir; that is the answer that I received.

Mr. ROBERTSON.—I will offer that in evidence.

Mr. COBB.—No objection.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit No. 10.)

Mr. ROBERTSON.—Letter-head of J. H. Cobb (reads):

Plaintiff's Exhibit No. 10.

“Juneau, Alaska, August 5, 1920.

“Mr. Enoch E. Mathison,

“305 Spexarth Bldg.,

“Astoria, Oregon.

“Dear Sir:

“Mr. John Tuppela received your letter of July 7, to-day, and I have carefully read it to him. He has also shown me a duplicate original of the contract you mentioned, dated March 11, 1918. Mr. Tuppela states that after the contract was made and after waiting on you several months to begin action, he notified you that the contract was at an end, for your failure to act.

“Mr. Tuppela employed Judge John R. Winn to bring a suit to recover his property, in May, 1919. Judge Winn associated me with him. We brought the suit and were ultimately successful. However, the lower court held against us, and one of the grounds of its decision was that Tuppela was guilty of laches in waiting so long (17 months) to bring his suit. Also in July, 1919, I wrote you asking for any papers Tuppela might have left with you. To this letter I never had the courtesy of an answer.

“Under these circumstances, I wholly fail to see

(Testimony of Enoch E. Mathison.)

how you have any rights under your contract. On the other hand, if [94] the United States Circuit Court of Appeals had affirmed the ruling of the lower court on the question of laches, Tuppela would probably have had a serious action against you for negligence.

“Very truly yours,

“J. H. COBB.”

A. Mr. Mathison, I call your attention to the statement made by Mr. Cobb in that letter, in which he says that “Mr. Tuppela states that after the contract was made and after waiting on you for several months to begin action, he notified you that the contract was at an end for your failure to act.” I ask you to state, Mr. Mathison, what, if any, notification John Tuppela, or anyone on his behalf, ever gave you that this contract between you and Mr. Tuppela was at an end on account of your failure to act, or on any other account whatsoever?

A. There was no statement made to me to that effect, or in any way to this day, excepting what he says in the answer to the complaint.

Q. Except in the pleadings in this case?

A. That’s all.

Q. Now, at the time that you wrote Mr. Cobb this letter of February 20, 1920, Plaintiff’s Exhibit No. 8, to which you have already stated that you received no reply, after that letter was written, what, if any, notice or demand did you ever receive from Mr. Tuppela or Mr. Cobb or from anyone whomsoever, acting on behalf of Mr. Tuppela, that the

(Testimony of Enoch E. Mathison.)

suit had been lost in the lower court; that is, in this court, and of the costs, and so forth, in order to appeal it to the United States Circuit Court of Appeals?

Mr. COBB.—We object to that as irrelevant and immaterial [95] for any purpose. I don't see how it is at all relevant that Mr. Tuppela or his attorneys, up here, why they should call upon him to help pay any part of the costs in the case.

The COURT.—Well, a part of the issues that you state—

Mr. COBB.—(Interrupting.) How is that?

The COURT.—That is a part of the contract—that he should furnish money, all moneys for the prosecution of the suit—the original contract.

Mr. COBB.—How is that?

The COURT.—It's upon the issue made by you in your answer that the original contract contemplated the furnishing of all moneys for the prosecution of the suit.

Mr. COBB.—Yes, we allege that.

The COURT.—Yes.

Mr. COBB.—But that part of it is not in evidence yet.

The COURT.—It is a matter of replication or surrebuttal, if you wish to introduce evidence on that point. Is that your point?

Mr. COBB.—Well—if we ever reach that point of the case. I don't know how the testimony will develop, but just now it is wholly immaterial.

Mr. ROBERTSON.—Very well, if that's the

(Testimony of Enoch E. Mathison.)

point. My recollection is that Mr. Cobb stated in his opening statement, made demands upon Mr. Mathison to participate in the costs of the suit.

Mr. COBB.—No; you misunderstood me. Let's straighten that out. I said that he was notified by the Clerk of the court here that the case had been lost and that he neither offered to aid in or assume any part of the heavy costs of taking it up. Now they are asking if we called on him.
[96]

Mr. ROBERTSON.—Very well.

The COURT.—I'll sustain the objection at the present time.

Q. Now, then, Mr. Mathison, after this letter that you wrote to Mr. Tuppela on July 7, 1920, and also the letter which Mr. Cobb wrote to you in answer to it, what did you do after that, if anything, in the way of making any further inquiries in regard to the matter? Did you do anything further, I mean, in the way of making inquiries at that time?

A. At that particular time I did not.

Q. What, if anything, did you do after that eventually, I mean to say?

A. Well, I kept in touch with the case to see what they were doing and found out that they had appealed the case to the Appellate Court and later on I wrote to the clerk over there to ascertain the status of the case.

Q. What I want to get at is, you eventually brought this suit?

(Testimony of Enoch E. Mathison.)

A. I then sent Mr. Mannix here to investigate the situation and he came up here in 1921.

Q. And after that, you did what?

A. I asked him to go and see Mr. Tuppela.

Q. I mean what did you do after that?

A. After that I brought suit.

Q. Now, Mr. Mathison, what do you say you have been damaged by the action of Mr. Tuppela in regard to this contract?

Mr. COBB.—I object as calling for a conclusion of the witness, and irrelevant and immaterial.

The COURT.—Objection sustained.

Q. Now, Mr. Mathison, during the time that Mr. Tuppela was in Astoria, did you make any advances or loans of money to him?

A. Yes; he came to me— [97]

Q. Well, now— A. Yes, I did.

Q. How did it come about that you made such advancements or loans?

A. He came to me and asked to borrow a few dollars from time to time.

Q. Did you keep any account of it, Mr. Mathison?

A. I kept account of some of the sums; some of the largest sums.

Q. You kept track of the largest amounts, did you? A. Yes; substantially all.

Q. I will ask you to look at the statement that is attached to your complaint in this case and state whether or not that is a correct statement of that—

Mr. COBB.—(Interrupting.) I object to that as

(Testimony of Enoch E. Mathison.)

calling for a conclusion. Let him testify to the items.

The COURT.—Yes; that is not the right way to get at it.

Q. Have you got any account of it?

A. I have in a small pocketbook.

The COURT.—The original memorandum?

Q. Is your original memorandum here?

A. Yes, sir. (Witness produces notebook.)

Q. What amounts do the original memoranda show of money advanced?

A. You want me to read the amounts?

Q. Read them slowly.

Mr. COBB.—I object to that until he proves it. Are those the memoranda you kept at the time?

The WITNESS.—Yes, sir.

The COURT.—And each statement was made on the date purported to have been made or thereabouts?

The WITNESS.—Yes; your Honor. [98]

The COURT.—You may testify.

The WITNESS.—(Referring to memorandum.)
March 11, \$8—

Q. March 11 of what year?

A. In 1918. March 18, \$8.25; March 23, \$12; March 30, \$10; April 12, \$10; April 16, \$5; April 22, \$15; April 30, \$12; May 6, \$5; May eleventh, \$6; May 15, \$2.25; May 18, \$12; May 20th, \$8; May 30th, \$10; June 5th, \$15; June 10, \$10; June 15th, \$15; June 18, \$3; June 25th, \$15; June 29, \$5; July 3, \$10; July 6, \$60; July 17, \$8; July 19,

(Testimony of Enoch E. Mathison.)

\$5; July 27, \$15—

Q. \$15? A. July 27, \$15.

Q. What, if anything is shown on July 22d?

A. Ten.

Q. Ten on July 22d, and July 27th, how much?

A. Fifteen.

Q. Very well.

A. August 7, \$10; August 12, \$10; August 16, \$15; August 20th, \$8; August blank, \$25.

Q. August blank, \$25. Do you know approximately when that was; what the date of that was?

A. It was just a day or two before the close of the fishing season.

Mr. COBB.—How is that?

A. (Continuing.) Which is the 25th.

Mr. ROBERTSON.—He said the 25th.

Q. About what time of the month?

A. I would judge approximately, it was about the 23d or it may have been on the 24th.

Q. That is, to the best of your recollection? [99]

A. Yes.

Q. You know how much those amounts aggregated that you have just read?

A. The total amount is \$362.50.

Q. Has Mr. Tuppela or anyone else ever repaid those amounts to you? A. No, sir.

Q. Ever paid any portion?

A. None whatever, sir.

Q. What was the understanding when you advanced them, as to whether or not they were to be repaid? A. They were to be repaid?

(Testimony of Enoch E. Mathison.)

A. By whom? A. By Mr. Tuppela.

Q. To whom? A. To me.

Mr. ROBERTSON.—I think that's all.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Mathison, you say you're an attorney of the State of Oregon and live at Astoria?

A. Yes, sir.

Q. You were admitted to practice in the courts of Oregon and Washington? A. Yes, sir.

Q. Ever been admitted to practice in the courts of Alaska? A. No, sir.

Q. You knew John Tuppela some years ago?

A. Yes, I did. [100]

Q. You saw him in the winter of 1917 and '18?

A. Yes, sir.

Q. Did you go up to Portland about November or December for the purpose of seeing him in Portland, Oregon?

A. I did, once or twice. I believe I went to see him twice.

Q. Now, when he went down to Astoria, that was about the last of December? He was released from the asylum on the 19th of December.

A. About there.

Q. Yes. Did you suggest to him that he employ you as his counsel? A. No.

Q. You know if anybody else suggested it to him?

A. I don't know that anyone suggested to him.

Q. Do you know a lawyer in Portland by the name of William Davis? A. No. In Portland?

(Testimony of Enoch E. Mathison.)

Q. Yes. A. Yes; I know him.

Q. Now, isn't it a fact that at the time you went down and got Mr. Tuppela to go down to Astoria, didn't Mr. Tuppela have a contract with Mr. Davis to bring suit?

A. I think that he had some sort of understanding with him.

Q. You knew that?

A. He told me that he had another contract.

Q. Now, wasn't it at your request that Mr. Davis released Mr. Tuppela from that contract, mutually canceled, so that you could take the case?

A. No, sir.

Q. That isn't true? [101] A. No, sir.

Q. You're positive of that? A. Sir?

Q. You're positive of that?

A. I'm positive of that.

Q. You haven't examined Mr. Davis' deposition, on file here in the Koskilainen case, have you?

A. I have.

Q. You have? A. Yes.

Q. What for?

Mr. MANNIX.—Wait a minute. We object to that as not proper cross-examination.

Mr. COBB.—I'm examining him for character as well as other things.

The COURT.—Yes; objection overruled.

Q. What for? A. For information.

Q. For information? A. Yes, sir.

Q. You wanted to see, didn't you, how far you could go without being caught up with—that's the

(Testimony of Enoch E. Mathison.)

information you wanted; that was the purpose of it, wasn't it?

A. I don't understand your question.

Q. You don't? The information you wanted was to see how far you could go in testifying without being caught up with, isn't it?

A. I don't understand what you mean by "caught up."

Q. Well, we'll let your answer go at that. Now, you testified yesterday that Doctor Coe advised that Mr. Tuppela shouldn't [102] come to Alaska for a while. A. That is a fact.

Q. The question is, didn't you so testify?

A. I believe I did.

Q. When was that advice given?

A. In the fall of 1917.

Q. In the fall of 1917? A. Yes.

Q. Now, when did you begin negotiations with Mr. Tuppela to act as his attorney?

A. March 11th is the date.

Q. Had you any negotiations before that?

A. I did.

Q. What?

A. I had interviews with him regarding his contentions.

Q. When did you send or telegraph to Sitka for a copy of the probate proceedings in the matter of the estate of John Tuppela, an insane person?

A. Shortly after he came to Astoria.

Q. Some time in January, 1918?

A. I believe that is the time.

(Testimony of Enoch E. Mathison.)

Q. You got them back about the first of February, some time in there? A. Yes, sir.

Q. Well, now, when this contract was entered into— Before I get to that, at the time Mr. Tupela was released from the asylum, he was utterly penniless, wasn't he?

A. I don't know. I didn't inquire as to that. I know that he had friends that were taking care of him up to that time. [103]

Q. Didn't you know that he didn't have any money?

A. He did say that he had money, yes, in Alaska.

Q. He had none down there?

A. I don't know whether he had any down there.

Q. When did you find out that he was utterly penniless?

A. That was after the contract was made.

Q. On the day it was made?

A. No; later; quite a bit afterward.

Q. Well, you just testified a while ago that you lent him some money on the day that the contract was made. A. Yes.

Q. Didn't you know that he was broke, then?

A. I didn't know that he was broke; there is a lot of men borrow money without being broke—

The COURT.—(Interrupting.) Well, now, the question—

Mr. COBB.—(Interrupting.) Didn't you know—

The COURT.—(Interrupting.) Wait a moment. That question calls for a direct categorical answer—yes or no. Did you know that he was broke at

(Testimony of Enoch E. Mathison.)

that time? A. No; I did not.

The COURT.—That's it.

Q. What did you lend him that \$8 for on that day?

A. He asked for that money and I loaned it to him.

Q. You just loaned it to him. Now, you knew, didn't you, that it was going to cost something to bring this suit up here?

A. Oh, yes. All suits cost money.

Q. Was Tuppela to furnish the money for it?

A. He was.

Q. Cash? A. Cash, or whatever—

Q. (Interrupting.) Advance it to you as you needed it? [104] A. Yes.

Q. Did you ever ask him for any money?

A. Yes, sir.

Q. And then turned around and lent it to him?

A. I asked him for money.

Q. When?

A. Some time after the contract was made.

Q. Well, when?

A. Oh, probably two months afterward.

Q. Two months afterward. Did you think he had any money? A. Yes.

Q. You had been lending him money every few days to eat on during that period, you say?

A. Yes, sir.

Q. And yet, two months after that you asked him for money? A. Yes.

Q. Had you any idea what the suit was going to

(Testimony of Enoch E. Mathison.)

cost?

A. Well, it wasn't definitely decided that it would be necessary to bring suit.

Q. What did you want the money, then, for?

A. I didn't want the money. I asked him whether he had money, yes, to go to Alaska and get this different information when the time came.

Q. Well, you made this contract on the eleventh day of March, 1918? A. Yes, sir.

Q. And there was no talk at that time that you were to advance any money at all for the purpose of carrying on the litigation? A. No, sir. [105]

Q. If it cost thousands of dollars, as it did, you expected Tuppela to furnish it?

A. I certainly did.

Q. Did you ever get any money from him?

A. I did not.

Q. For expenses? A. No, sir.

Q. Now, then, you stated yesterday, that you thought you might bring this suit to recover this Alaska property up here in the State of Washington, didn't you?

A. I don't recall just the exact words that I stated, but my idea was, at that time, that if it became necessary to start suit, it was possible that it could be brought in Washington.

Q. Did you ever find out that the courts of the State of Washington had no jurisdiction over property in Alaska? A. Well—

Q. (Interrupting.) Just answer the question yes or no. A. Oh, yes; I know that.

(Testimony of Enoch¹ E. Mathison.)

Q. When did you find that out?

A. Well, that is a general rule.

Q. Oh, yes. When did you find it out? You say you were going to bring suit in the State of Washington, or thought you would. When did you first find out that such a thing was an impossibility?

A. When I went to law school, I believe.

Mr. ROBINSON.—Wait a minute.

The COURT.—What is the objection?

Mr. ROBERTSON.—He is asking him now when he first found out that fact. He hasn't testified to anything of the kind. He's insinuating now. Let him ask a direct question. [106]

The COURT.—Yes; objection sustained.

Q. Well, you did find out, then, did you?

A. I knew that as a general law.

Q. You know that as a general law. Still you figured on bringing it in the State of Washington first? A. Oh, no.

Q. Oh, you didn't? A. No.

Q. Now, then, did you know where the head office of the Chichagoff Mining Company was?

A. In Tacoma.

Q. Did you ever go up there to see them?

A. No, sir.

Q. Ever write to them? A. No, sir.

Q. Made no effort, then, to settle the case?

A. It wasn't advanced that far.

Q. Oh, it wasn't advanced that far. Well, you never did? A. No; I did not.

Q. You did not. In the event that it wasn't

(Testimony of Enoch E. Mathison.)

settled, you were going to bring suit?

A. That would be the last resort.

Q. That would be the last resort. A. Yes.

Q. You made no effort, however, to settle it?

A. I did not, since the case wasn't advanced that far.

Q. Well, just answer my question?

A. I did not; that is the way I have answered that.

Q. Now, you had a little over two weeks in February, 1918, after the contract was made. You didn't either attempt to settle [107] it or bring suit? A. What was that question?

Q. I said you had, after the contract was signed, something over two weeks in the month of February, 1918, in which either to make an effort to settle it or bring suit? A. In February, 1918?

Q. Yes. A. The contract was signed in March.

Q. I mean March. A. March 11.

Q. March 11. You had twenty days in that month, didn't you, to make an effort to settle it or bring suit, and you didn't do either?

A. No; I told you—

Q. (Interrupting.) All right. Just answer the question. A. No, I did not.

Q. Now, in April did you make any effort to settle it or bring suit? A. I did not.

Q. Did you in May?

Mr. MANNIX.—I object to this. Witness has testified that he never made any effort to settle it. I don't see the use of all the repetition.

(Testimony of Enoch E. Mathison.)

The COURT.—Objection overruled; he may state.

A. No, sir; I did not make an effort to settle it. The case was not advanced to that state.

Q. Now, just answer my questions. You can make your explanations later to your own counsel. You didn't in June? A. No, sir. [108]

Q. Nor in July? A. Nor in July.

Q. Nor in August? A. Nor in August.

Q. Nor in September?

A. Nor in September.

Q. October? A. No, sir.

Q. November? A. No, sir.

Q. Or December, 1918? A. No.

Q. No. Now, you say in your complaint— The original complaint in this case was sworn to by you, wasn't it? A. I believe so.

Q. Now, I call your attention to this statement in your complaint: "That the plaintiff contemplates the institution of legal proceedings against the Chichagoff Mining Company, a corporation, for the recovery of the said defendant's interests in said properties and all moneys due said defendant because of the withholding from said defendant and depriving him thereof and because of the development of the same, and that it was mutually agreed between plaintiff and said defendant that said defendant would go to Alaska as soon as possible to obtain an interview with certain important witnesses and procure certain letters and documents which were important to be had at that time."

Now, when was that?

(Testimony of Enoch E. Mathison.)

A. That the plaintiff—?

Q. That you and Tuppela—you refer to it as plaintiff and defendant— [109] when was it that this matter occurred—that you contemplated the bringing of this suit, as you say?

A. After I had secured sufficient evidence to justify bringing the suit.

Q. Perhaps I didn't make my question plain. You then continue: "Thereafter, and in pursuance with said agreement with plaintiff, said defendant left said Astoria on or about the — day of September, 1918, for the purpose of going to Juneau, Alaska, getting the information, documents and letters required and returning to Astoria at the earliest date possible."

The COURT.—Is that in the first cause of action?

Mr. COBB.—That's in the first cause of action. But I am asking him—he said he swore to it.

The COURT.—I take it the second cause of action was one of the issues of your case.

Mr. COBB.—Yes, because the same thing is repeated, but not so fully, in the second.

Q. Now, that occurred what time in September? You left the date blank.

Mr. ROBINSON.—What is what that occurred, Mr. Cobb?

A. That Tuppela left Astoria?

Q. Yes; in pursuance of this agreement?

A. Well, I wasn't sure just when he left. He left right after the fishing—

Q. (Interrupting.) When was he fishing?

(Testimony of Enoch E. Mathison.)

A. Sir.

Q. When was he fishing?

A. He had not been fishing, but he had an old miner friend here who had been in Juneau and he owed him some money, and was [110] going to Alaska also and that he was going at the same time, but that he couldn't go until the fishing was over, which would be a few days after the 25th—the close of the fishing season.

Q. He left at that time and everything was perfectly friendly between you? A. Yes, sir.

Q. And he was coming up to Alaska to see about his case? A. Yes, sir.

Q. You didn't come with him? A. I did not.

Q. In July you made arrangements at one time to come and then canceled your reservation?

A. Yes; that is true.

Q. Was that because you didn't have enough money to pay expenses? A. It was not.

Q. It was not? A. No.

Q. You knew where Tuppela was going, didn't you? A. Yes.

Q. Is that the only time that he ever left down there after the contract was signed?

A. Left Astoria?

Q. Yes; left down there?

A. Yes; he left once before.

Q. Where to?

A. To come here to Alaska.

Q. Well, you knew about that, didn't you?

A. Yes.

(Testimony of Enoch E. Mathison.)

Q. And he came back in a few days? [111]

A. Yes, sir.

Q. When was it that he left for parts unknown to you?

A. Well for parts unknown, he left on September first, or after the fishing season.

Q. For parts unknown?

A. Well, he left for Alaska.

Q. Now, I call your attention to your letter to Tuppela, dated July 7, the day after the Circuit Court of Appeals decided this case in his favor, in which you remind him— I'll read it. It's a long sentence, and I'll have to read all of it to make any sense (reads):

“I do not propose, in this letter, to cite the work which I did in your behalf after the execution of said contract, as that is beyond the purview of this letter, and you personally know concerning the large amount of work which I did on your behalf, but I wish, at this time, to state that I am able conclusively to show that I was at all times, ready, able and willing, fully to carry out all the terms of said agreement to be kept and performed on my part, and that you, shortly after the execution of this agreement failed to keep your part of the same and left for parts unknown to me.”

Now, when was it that he left for those parts unknown to you?

A. Well, so far as hearing from him, it was for parts unknown. I couldn't—I tried to ascertain

(Testimony of Enoch E. Mathison.)

where he was and I couldn't locate him.

Q. Well you knew at that time when you wrote that letter that he had come to Alaska?

A. I certainly did. [112]

Q. Why did you say "parts unknown," then?

A. Well, I didn't know—

Q. (Interrupting.) On which occasion were you telling the truth, if either?

Mr. MANNIX.—Just a minute. Let the witness answer the question.

A. I'm telling the truth on both.

Q. He left with your full knowledge and consent for Alaska? A. Yes, sir.

Q. And then he left for parts unknown?

A. Well, if you want to take it that way.

Q. All right. I want to know how the jury will take it. You're talking to them; not to me.

Both of those statements are true?

A. Yes, sir.

Q. When you wrote that letter, you knew exactly where he had gone to, didn't you?

A. Yes, sir.

Q. Now, then, in January, 1919, you didn't make any effort to settle the case or to bring suit, did you? A. No.

Q. Did you in February, 1919?

A. No; I was trying to locate Mr. Tuppela during all that time.

Q. You knew he had left for Alaska, didn't you?

A. Yes.

Q. Couldn't you come up here?

(Testimony of Enoch E. Mathison.)

A. But I had heard that he was sick with the flu in Tacoma. I traced that up and found out he wasn't there.

Q. You did? A. Yes, sir.

Q. Did you do anything in March, 1919, either to make an effort [113] to settle the case or to bring suit? A. In March, 1919?

Q. Yes.

A. That was about the time when I heard he had retained counsel here by the name of Winn.

Q. Well, you afterwards found out that he hadn't retained Judge Winn? A. Sir?

Q. You afterwards found out that he hadn't retained Judge Winn?

A. I afterwards found out that he had retained Winn in December, 1918.

Q. Did you know Judge Winn?

A. I did not.

Q. Did you make any objections to his being retained? A. I did not.

Q. You said you didn't know me either. When you heard we had been employed on the case, did you make any objection to either of us?

A. No; I thought J. H. Cobb was a real estate man or something like that.

Q. Have you the Federal Reporter in your office?

A. No, sir.

Q. (Continuing.) For the last twenty-five years?

A. No, sir.

Q. You never examined that to find out that I had appeared before the Circuit Court of Appeals

(Testimony of Enoch E. Mathison.)

dozens of times in the last twenty-five years?

A. I never knew of an attorney having a letter-head that didn't show that he was an attorney.

Q. That's something new.

A. That's something new. [114]

Q. You didn't answer that letter, did you?

A. I answered it through Mr. Tuppela.

Q. In answer to me?

A. Well, your letter don't ask a letter to you, and I didn't know you. I thought you were a real estate agent, and I have had some dealings with real estate agents, so I didn't—

Q. In your letter later you stated that you had lost that letter? A. It was mislaid; yes.

Q. Did you send Mr. Tuppela any of his papers?

A. I didn't have any of his papers.

Q. He had taken them all out of your hands when he left down there?

A. He didn't have any papers. He had commitment papers, copies of them; copies of which I had certified to.

Q. He had taken all those out of your hands when he left there?

A. They were unnecessary, because I had certified copies.

Q. Well, just answer my question?

A. Yes; yes; yes.

Q. Took all of his papers down there in August or September, 1918, and came to Alaska?

A. He didn't take them; he had them in his possession all the time.

(Testimony of Enoch E. Mathison.)

Q. Had them in his possession all the time?

A. Yes.

Q. You never had them?

A. I never had them.

Q. You didn't write and inform us of that fact, however, did you?

A. No; but I wrote to Tuppela. [115]

Q. You wrote to Tuppela? A. Yes.

Q. In Finnish?

A. Yes. Had you told me, written me that you were an attorney and was his attorney, I certainly would have written you.

Q. You certainly would have. You don't write to real estate agents, however?

A. Quite a number of those sharks I haven't any use for.

Q. And so when a man has his name on his paper and nothing else you assume that he is a real estate agent? A. Sir?

Q. When a man has his name on his letter-head and nothing else, name and address—you assume that he is a real estate agent?

A. If he has a name and profession on it,—attorney at law—I respect that profession and I certainly would have written you.

Q. Answer my question, Mr. Mathison. I say, you assume that if they don't appear there, as attorney at law or some other occupation, that he is a real estate agent?

A. Well, they usually have those kind of letter-heads.

(Testimony of Enoch E. Mathison.)

Q. They do? A. Yes.

Q. Did you ever see a real estate agent yet with a letter-head that didn't express his business on it?

A. Yes, sir.

Q. You have? A. I have.

Q. That's nothing new, then, for real estate agents, but it is something new for lawyers?

A. It certainly is. I never saw a lawyer yet who was ashamed [116] of his profession—who wouldn't put his profession on the letter-head.

Q. Now, then, when is the first time you wrote to the Clerk of the Court?

A. That was the 20th of February, 1919—

Q. Was that the first knowledge you had—

A. (Interrupting.) 1920.

Q. 1920? A. Yes.

Q. Was that the first knowledge you had that suit had been brought?

A. I had heard of it, but not directly.

Q. How did you say you came to write that letter to the Clerk of the court?

A. The Clerk of the court here?

Q. Yes.

A. I wanted to ascertain— My interest was to still protect Tuppela—and see whether or not there was really a suit commenced, and for that reason, when I knew that Tuppela was in Juneau and had retained counsel, I wanted to find out definitely what the status of that case was. That is the reason I wrote.

Q. Well, when you got the Clerk's letter, you

(Testimony of Enoch E. Mathison.)

knew that the case had been lost? A. Yes.

Q. Did you make any effort to try to redeem the situation, such as offering to join or aiding in the appeal?

A. No; after I had seen that the same J. H. Cobb who had written me a letter previously was also an attorney in the case, I relied on it that you did your duty to your client, whom you knew was my client also. [117]

Q. How did I know that he was your client also?

A. How did you know?

Q. Yes. Q. Tuppela showed you the contract.

Q. And you knew that I stated in my letter to you that at that time Tuppela stated to me that that matter had been ended between you, didn't you? A. No, sir.

Q. I had informed you of that fact in my letter, hadn't I? A. No, sir.

Q. How did you know at that time that Tuppela had showed me the contract?

A. Because I knew that Tuppela was honest in that respect.

Q. Oh, that's the way? A. Yes.

Q. You just inferred it, then, from that?

A. Yes.

Q. As a matter of fact, you didn't know whether I had seen it all, did you?

A. I was positive you did, because you wrote me a letter.

The COURT.—Well, now, answer the question.

Q. I say, as a matter of fact, you didn't know in

(Testimony of Enoch E. Mathison.)

February, 1920, that I had ever seen the contract at all, did you? A. As a matter of fact, I did not.

Q. No. And the first time that you did have any knowledge that I knew of the contract, you also knew from my statement that Tuppela had told me that that matter had been ended before he came to Alaska? A. I didn't get that.

Q. I say, the first time you did know positively that I had [118] ever seen the contract, you also knew that Tuppela had stated to me that the contract between you had been ended before he came to Alaska, didn't you? A. No; I did not.

Q. Didn't I tell you that in my letter?

A. No, sir.

Q. In this here?

A. Oh, you mean the letter you wrote in 1920?

Q. The one in which I informed you that I had seen the contract?

A. That was after the case had been adjudicated.

Q. That was the first knowledge you had that I had ever seen the contract, isn't it?

A. Actual knowledge; yes. You didn't tell me even then. Oh, I guess you did.

Q. You guess I did. And that's the first time you ever knew that I had ever seen the contract?

A. As a matter of fact; yes.

Q. Then, why did you tell this jury a moment ago that I knew that Tuppela was also your client?

A. Why did I tell—?

Q. Yes.

(Testimony of Enoch E. Mathison.)

A. Well, Mr. Lepisto told me the other day—

Q. (Interrupting.) Oh, you're putting in Mr. Lepisto's hearsay testimony now.

A. Well, you're asking me that.

Q. I am asking you for testimony; not hearsay. You ought to know—

The COURT.—Well, now; no arguing.

Q. Based upon Mr. Lepisto's statement to you; that's all. [119]

A. And a general understanding of Mr. Tuppela's acts and honesty.

Q. Mr. Tuppela is an honest man, you say?

A. He was. In those respects he was honest.

Q. You did not, however, when you learned that the case had been lost, take any steps to protect Tuppela's interests, did you?

A. No; you—

Q. (Interrupting.) Answer that yes or no?

A. No; I did not. You were retained as his attorney, and it was not my position to do that.

Q. Did you ever engage or associate with you any Alaska attorney in the case?

A. Against the Chichagoff Mining Company?

Q. Yes.

A. No; I did not.

Q. You never. Anything to prevent you from doing that? A. Oh, yes—

Q. (Interrupting.) Prior to the time the suit was brought in May, 1919, fourteen months after your contract, was there anything to prevent you from associating—

(Testimony of Enoch E. Mathison.)

Mr. ROBERTSON.—Just a minute. We object to this line of examination. It's not proper cross-examination. I don't know just what he is driving at, but it seems to me that it ought to be confined either to the issues in the case or to the testimony brought out on direct examination. Now this particular question that he is asking him, I can't see the materiality of. I don't know of any such testimony brought out on direct examination, or how it can have any bearing— [120]

The COURT.—(Interrupting.) Well, it does, to a certain extent. It was brought out on direct examination, the original contract— It was inserted in the original contract that he intended, if necessary, to associate an attorney authorized to practice in the Territory, and it goes to that particular point, whether he did at that time before 1919, associate any attorney or did he intend to, in accordance with that clause of the contract. That was brought out on direct examination.

Mr. ROBERTSON.—That is very true, your Honor, but it also—

The COURT.—Objection overruled.

Q. Was there anything, after the contract was signed and prior to the time that the suit of Tuppela against the Chichagoff Mining Company was filed in this court, about fourteen months, lacking nine days, was there anything to prevent you from associating counsel with you up here?

A. Well, after—

Q. (Interrupting.) Just answer that yes or no.

(Testimony of Enoch E. Mathison.)

A. Was there anything to prevent me?

Q. Was there anything to prevent you; yes.

A. Oh, yes.

Q. What? A. Tuppela's actions himself.

Q. Tuppela's actions in coming to Alaska to look after his case?

A. He didn't comply with my instructions or his part of the contract in getting the information and getting the papers and writing me or coming back and making a report. I could not. You know that yourself. I couldn't employ counsel here and there when I didn't know just when I would bring [121] suit, if suit was necessary.

Q. Had you found out whether a suit was necessary or not?

A. I hadn't advanced to that position. I am not the kind of lawyer that will file a suit whenever a client comes into his office just to get attorney fees.

Q. Do you usually wait fourteen months?

A. I wait for the proper time. When I have both the facts and the law in the case, then is when I take my steps.

Q. Do you always rely upon your clients to look up the facts in a case? A. Principally.

Q. Always? A. Yes, sir.

Q. Uh-huh.

A. If a client can't furnish facts, I can't make him. I don't make facts.

Q. And you never yourself examine it to find out—look up the facts in a case? A. Oh, yes.

Q. Did you do it in this case? A. I did.

(Testimony of Enoch E. Mathison.)

Q. Did you come to Alaska to find out about it?

A. No, sir.

Q. You stayed in Astoria? A. How is that?

Q. I say, you stayed in Astoria?

A. That is where I practice law; yes.

Q. And there is where you were looking up the facts?

A. All that I could get hold of there.

Q. All that you could get hold of there. Well, could you get any facts in Astoria? [122]

A. Yes, sir.

Q. Who from? A. From Mr. Tuppela.

Q. Oh, you couldn't get anything after he came to Alaska to see about his business, could you?

A. After he came here?

Q. Yes.

A. I had gotten all the facts that I thought it was possible to get.

Q. I say, you couldn't get any more facts in Astoria after he left? A. After he left; no.

Q. You couldn't get any more facts—

A. (Interrupting.) All the facts—

Q. (Continuing.) So you sat still?

A. All the facts that it was possible to get—

Q. (Interrupting.) Just answer my question.

A. What is that?

Q. You needn't argue the question.

A. All right; what is it?

Q. You didn't do anything after that towards looking up any facts, after he left for Alaska?

A. Yes; wherever there was a possibility, but,

(Testimony of Enoch E. Mathison.)

of course, there wasn't any chance for me to get any more facts, for the reason that I had already worked a very long time to get what there was to be had over there.

Q. Did you ever hear of the doctrine of laches as a defense in mining cases?

A. Oh, yes; well, not particularly mining cases.

Q. Never heard of it. You didn't know that that defense would apply with great strictness in a mining case? [123]

A. I knew—

Mr. ROBERTSON.—(Interrupting.) I object to that as irrelevant and immaterial. We don't think on a breach of contract suit for damages on a certain contract, he can go into a theory of law to show whether or not one particular attorney might have a less or greater knowledge than some other attorney. In other words, the doctrine of laches in this particular case was enunciated by this Court and overruled by the Circuit Court of Appeals. It was decided by the Circuit Court of Appeals that it wasn't laches—that was in the Appellate Court, in the very case that Mr. Cobb is now speaking of. Now, then, to maintain whether or not this man, Mr. Mathison, happened to know about that doctrine or not, doesn't affect his rights under the contract one way or the other.

Mr. COBB.—No; the Circuit Court of Appeals did not lay that down. What saved the case—

Mr. ROBERTSON.—(Interrupting.) Well, they overruled the case.

(Testimony of Enoch E. Mathison.)

The COURT.—I understand what the Circuit Court of Appeals laid down in the matter. This question goes to the defense of whether, under the contract, the defendant, or the plaintiff rather, exercised due diligence in pursuing the terms of the contract, in this case, and I think the testimony—

Mr. COBB.—How is that?

The COURT.—Being the defendant in the case, I think you are entitled to cross-examine him. You may ask him.

Mr. ROBERTSON.—We except.

Q. You say you hadn't heard of that in mining cases? [124]

A. Well, I had read, yes—mining cases as well as other cases.

Q. You didn't know that it was applied with great strictness in mining cases, did you?

A. Well, not particularly mining cases, but in this particular case—

Q. (Interrupting.) Just answer the question.

A. Sir?

Q. Just answer the question.

A. What is the question.

Q. Did you know it was applied with great strictness in mining cases?

A. It is usually applied; yes.

Q. Did it ever occur to you that such a condition of facts over at Chichagoff might exist in which a delay of even a few months might be fatal to Tuppela's rights, after he got out of the asylum?

A. No.

(Testimony of Enoch E. Mathison.)

Mr. ROBERTSON.—We make the same objection.

Q. That never occurred to you?

A. No; I knew that he had not—I knew that the sale was void.

Q. Now, then, these letters that you have been testifying about, of which you have no copies, written in Finnish you say, to Tuppela, were they?

A. Yes sir.

Q. How did it happen that on July 7, 1920, you wrote to him in English and registered the letter?

A. Because I knew that you were his attorney and that you were directing his actions. Neither you nor he had answered my letters. This time I was going to write a letter and register it—take no chances—have a return card demanded; [125] and it came to you according to the return card, with your handwriting on it—John Tuppela, by J. H. Cobb.

Q. Did you know that for more than a year preceding that, all of Tuppela's mail came to me—I accepted it, and that he didn't go to the postoffice?

A. I believe that you took care of Tuppela's letters, all right.

Q. How is that?

A. I believe that you took care of Tuppela's mail, all right.

Q. Did you know that Tuppela is a man who was so ignorant that he didn't go near a postoffice to get any letters, and that if he got any letters, they would have to come through somebody else?

(Testimony of Enoch E. Mathison.)

A. Oh, I didn't know about that.

Q. You didn't know about that? A. No, sir.

Q. How did you know that I was taking care of his mail? A. Didn't you sign the return card?

Q. That was in 1920. Did you know it before that? A. How is that?

Q. You sent that in my care, didn't you?

A. That I don't recall.

Q. You don't recall?

A. But I don't think so. I wrote to John Tuppela.

Q. But the return card was signed John Tuppela, by me, wasn't it? A. It certainly was.

Q. You knew that Tuppela couldn't read English? A. Yes; but I knew that you could.

Q. Well, then the letter was to me as much as it was to Tuppela, wasn't it? A. Yes; it was. [126]

Q. Well, then, why didn't you send it in my care?

A. Well, you were not a party to the contract.

Q. But you just stated that it was as much to me as it was to Tuppela, didn't you?

A. Well, in this way it was: you were his attorney. Letters that would come to Tuppela with respect to his interests, you would get those. He would come to you.

Q. Naturally.

A. Naturally. Or, if he didn't, you would see that he would. In that way, it was as much to you as it was to him.

Q. Now, then, you received my letter in reply to that, written for Mr. Tuppela, that has been intro-

(Testimony of Enoch E. Mathison.)

duced in evidence here?

A. What, that real estate letter?

Q. Yes. A. Yes.

Q. And you didn't answer that?

A. I answered Tuppela.

Q. Oh, you answered Tuppela.

Mr. ROBERTSON.—Well, now, which letter are you speaking of? There are two or three letters.

Mr. COBB.—The letter in answer to his letter of July 7; my answer through Mr. Tuppela, then.

A. Oh, the one that you answered—

Q. (Interrupting.) I think it is July 20th; some time in July, 1920, I mean.

A. Your letter, in answer to mine which was registered?

Q. Yes. A. No; I did not reply to that.

Q. You didn't answer that? A. No.

Q. Now, then, on July seventh, the case of John Tuppela against [127] the Chichagoff Mining Company was decided by the United States Circuit Court of Appeals?

A. It was somewheres around that date.

Q. The first Monday in July; the first time the court met? A. Yes; I believe so.

Q. Now, you saw a report of the decision published in the papers? A. I did.

Q. That is the information upon which you were demanding your pay? A. Yes, sir.

Q. For the work you had done? A. Yes, sir.

Q. Now, then, when did you bring this suit?

A. I brought this suit—complaint, I guess, was filed—

(Testimony of Enoch E. Mathison.)

Mr. ROBERTSON.—(Interrupting.) Well, the record of the Court is the best evidence on that.

The COURT.—He can answer if he knows?

Q. Well, the complaint was verified on October, in October, 1921, third day of October, 1921.

A. It was in the fall of 1920—

Q. That's fourteen months after you wrote this letter? A. Yes, sir.

Q. You had seen it published in the papers that Tuppela some two or three months before that had gone insane? A. No; I didn't know that.

Q. Didn't know that? A. No, sir.

Q. When you brought this suit, you didn't know that Tuppela was insane? A. No; I did not.

Q. Didn't know it at all? [128]

A. No, sir.

Q. You were suing him for money and didn't know that he was adjudged insane some three months before? A. No, sir.

Q. Why, then, did you plead those facts in your complaint, if you didn't know it?

A. At the time of—

Q. (Interposing.) Of filing this suit.

A. Oh, I knew it then.

Q. That is what I am asking you, and you just denied it.

A. I thought you said before that. Before I had brought any suit I didn't know. The first time that I knew that he had gone insane was when Mr. Manix returned from the investigation, and I asked him if he saw Tuppela and he said, "No."

(Testimony of Enoch E. Mathison.)

Q. Then after he went insane, you brought this suit?

A. If that happens to be the fact; yes.

Q. You stated on yesterday, if I remember rightly, that when Tuppela left down there the last of August or the first of September, he had three hundred dollars? A. No.

The COURT.—No, he said he stated that he said he had \$300.

Q. Oh, he said he had three hundred dollars?

A. He said—I think you objected to it and I didn't finish my question, or answer—he had money coming from a man by the name of Impola—money belonging to him previously in Alaska, and it was \$300; that he was going to pay him that money when the fishing was over.

Q. Well, did he ever tell you whether he paid him or not?

A. No, I haven't seen him since. Impola had given part of that, either that, or some money, previous to that. [129]

Q. What I am getting at is—if I misunderstood you, I want to be corrected on it—did you know that he had three hundred dollars at that time?

A. I don't know whether he had it on his person. As I understood it, he didn't have it but that he would get it after the fishing season was closed and Impola was to—

Q. (Interrupting.) And it was closed then?

A. It was not closed; no.

Q. Well, at the time he left, it was closed?

(Testimony of Enoch E. Mathison.)

A. It was closed; yes; but I didn't see him—I was there then—but it was a few days before, about the 23d or—fourth of August.

Q. You don't know, then, as a matter of fact, whether he had any money or not?

A. Well, yes; he had money.

Q. Now, you say that along the last days of August, you let him have \$25?

A. Well, that was the time.

Q. How is that? A. That was the time.

Q. That he left?

A. That is the time I saw him last.

Q. What did you let him have that money for?

A. He asked for it.

Q. He asked for it?

A. Yes; and I said, "Yes; I can let you have it."

Q. Did you lend him this money simply as a friend?

A. Well, yes; that was loaned in that spirit.

Q. The fact that you had this contract had nothing to do with it at all, did it? [130]

A. I don't think that entered into it.

Q. You don't think it did? A. Yes.

Q. Well, what do you know about that?

A. How is that?

Q. Did you lend him any before the contract was made? A. No, sir.

Q. You lent him some on the day it was made?

A. Yes, sir; he came back that afternoon and asked me if he couldn't have ten dollars, and I had eight dollars, I think it was, in my pocket, and I

(Testimony of Enoch E. Mathison.)

gave it to him.

Q. And he came in on the 18th, just a week later, and got \$8.25 more?

A. Yes; that is noted there.

Q. Did you pay him that in cash?

A. In cash; yes.

Q. How did it happen to be eight dollars and eight and a quarter?

A. I don't just recall now. I remember that he had come in twice.

Q. Do you tell this jury, now, that these advances you made there have nothing to do with your contract whatever? A. No, sir.

Q. Well, do you tell them that now or not?

A. What is the question.

Q. Do you tell the jury that these advances you made had nothing to do with the contract signed—had no relation to the contract whatever?

A. No, he said he would pay that; that he had money in Alaska regardless of the result of the suit.

Q. Uh-huh.

A. That he had money coming and he would be able to pay that. [131]

Q. That is, provided he lost out, he could get then, the proceeds of the guardian sale? Is that it?

A. He told me he had some money coming—

Q. (Interrupting.) Just answer the question. Is that it? A. No.

Q. What other money did he have?

A. I don't recall now, but he said he had money

(Testimony of Enoch E. Mathison.)

coming from the different loans he had made.

Q. Wasn't the understanding between you and old man Tuppela, when these advances were made, to the effect that you should be repaid out of what you were to get from the Chichagoff Mining Company? A. No.

Q. That wasn't the understanding at all?

A. No.

Q. You just lent it on the credit of John Tuppela, independent of your employment? A. Yes.

Q. John Tuppela had credit with you for the sum of \$362.50? A. Yes.

Q. All of this money that you advanced, none of it was for expenses connected with the suit—not a dollar? A. None of it.

Q. This sixty dollars, that was advanced him to come up here to see about the case at the time you both were coming up?

A. Yes; he didn't have any money.

Q. Well, that was part of the expense of carrying out the contract, wasn't it. A. No.

Q. It was to pay John Tuppela's expenses to Alaska, wasn't it, [132] to see about this litigation—you and he?

A. No, he just wanted the money as a loan.

Q. Didn't you testify yesterday that you let him have that at the time you were both coming to Alaska, and you had to cancel your reservation because you found out you couldn't come?

A. Yes.

Q. And wasn't that to pay his expenses up here?

(Testimony of Enoch E. Mathison.)

A. No; I suppose he intended to use it for that, but that is the amount I loaned him.

Q. Didn't you know that that is what it was for?

A. Well, no. Doctor Coe told me that he would get passage, a ticket for him and expense money, to here, but he wanted to borrow this sum.

Recess until 2 P. M. this day, Nov. 9, 1922.

2 o'clock P. M., November 9, 1922.

Court met pursuant to recess.

ENOCH MATHISON (on stand).

Cross-examination (Resumed).

(By Mr. COBB.)

Q. You stated, in your direct examination, I believe, that during the summer of 1918, or a part of the time, you were busy with some cases in the Supreme Court of Oregon or Washington?

A. Both.

Q. What were the names of those cases?

A. One was Matt Hendrickson vs. Sund.

Q. Sund? A. (Spells:) S-u-n-d.

Q. What was that in, which court?

A. In the Supreme Court, State of Washington.

[133]

Q. Were they afterwards decided by the court?

A. Yes, sir.

Q. Do you know whether it was reported?

A. It was reported; yes.

Q. Have you the reference to the report?

A. It was reported in 177 Pac. 808.

Q. Now, how long would it take you to go from Astoria to Olympia? The case was heard at Olym-

(Testimony of Enoch E. Mathison.)

pia, Wash? A. Yes.

Q. How long would that take you?

A. Oh, about three days; two or three days.

Q. That is to go and come back?

A. Yes; about three days.

Q. What was the other case?

A. The other case is Mathison vs. Anderson.

Q. Is that yourself? A. Yes, sir.

Q. In the Supreme Court of Oregon?

A. Washington.

Q. Washington. Where is that reported?

A. State of Washington. That is reported in 174 Pac. 642 and again in 182 Pac. 622.

Q. Was that argued at the same time that the other case was?

A. That was pending then in the Supreme Court.

Q. How is that? A. It was pending then.

Q. I say, did you make two trips up or were they argued at the same time, the same day?

A. I made several trips. There were motions to dismiss and then a motion for rehearing and they *they* recalled the mandate and then finally to dismiss—

Q. (Interrupting.) Was that all the cases you had that summer? [134]

A. In the Supreme Court of the State of Washington?

Q. Yes.

A. That was all that I had in that court.

Q. Well, you said something about a case in the Supreme Court of Oregon? A. Yes.

(Testimony of Enoch E. Mathison.)

Q. In the summer of 1918, that prevented you from coming at that particular time to Alaska.

A. They didn't prevent me, but there were matters that I had to attend to. One was the case of John Woupio—

Q. (Interrupting.) What is the name?

A. (Spells.) W-o-u-p-i-o. Woupio vs. Clatsop County.

Q. Versus what?

A. Clatsop County.

Q. Can you give me the report of that?

A. No, I couldn't give you that.

Q. Any others?

A. That is all that I can recall. I just happened to think of these the other day.

Q. Now, how many times, or how many trips did you make up to Olympia on those two cases of your own and your client's?

A. On my own case, I made quite a number of trips there. It involved a lot of litigation.

Q. Quite a number in both cases?

A. About three, I think, on the other one.

Q. About three on the first one you mentioned—three trips on it? A. I believe so.

Q. Three hearings? A. I believe so.

Q. Three hearings on the Matt Hendrickson case and three on [135] your own case?

A. I don't recall. There were at least three in my case, but the Hendrickson case—

Q. All that summer—all the hearings that summer? A. Mostly that summer and fall.

(Testimony of Enoch E. Mathison.)

Q. You know when you went up?

A. I was there on the hearing of the case on its merits, that was on June 16.

Q. That was the first trip you had to make?

A. No; I had made several trips before that.

Q. Well, did these three cases take up all your time that summer?

A. I had several cases in the Circuit Court.

Q. In the Circuit Court. Did your business in the petit courts and the other courts take up all your time?

A. Then I was on the legal advisory board for the local draft board.

Q. Would that take up all your time, including the time that you put in on the case?

A. How is that?

Q. Would that take up all your time, including the time that you put in on the case?

A. And other phases to attend to; it did. It took more than my time.

Q. Took up more than your time?

A. We were all crowded up here—every attorney—because during the war many of them were in the service.

Q. When did this excessively busy spell begin?

A. It was there all the time that I recall.

Q. All the time from March 11th on? [136]

A. Sir?

Q. All the time from March 11th, on?

A. And prior to that.

Q. And prior to that. And having this business

(Testimony of Enoch E. Mathison.)

on hand, you knew the work that was ahead of you?

A. Yes; I knew that this required very thorough preparation.

Q. So that you had no time to come to Alaska?

A. I didn't know at the time—

Q. (Interrupting.) Well, just answer the question? A. What is it?

Q. You had no time to come to Alaska, you state?

A. No, I don't.

Q. You stated that is one of the reasons you didn't come? A. No; I didn't.

Q. Didn't you? A. No, sir.

Q. Answer the question. You had no time?

A. I said, no, sir.

Q. What is that? A. I said no, sir.

Q. And you knew that in March, the 11th, how busy you were going to be?

A. Well, I was busy all the time.

Q. Now, then, you stated yesterday afternoon, I believe, that you ascertained it took some two months to make the round trip from Portland to Sitka?

A. That is what I figured it would take to come here and make the investigation.

Q. Uh-huh.

A. From the reports that I received from the steamship companies [137] and others that had been here.

Q. Did you ever find out any better? A. Sir?

Q. Did you ever find out any better?

A. Any better?

(Testimony of Enoch E. Mathison.)

A. Yes.

A. Well, I thought that was good information.

Q. Did you ever find out that it wasn't good information? A. No; I didn't.

Q. It wouldn't take you over a few weeks to come up and go back, would it?

A. I haven't found out any otherwise.

Q. How long does it take you to go from Astoria to Seattle? A. You can make that in a day?

Q. Have you found out how long it takes—And you can go back in just a day, can't you?

A. Yes, sir.

Q. Have you found out how long it takes to go from Seattle up here?

A. They say that it is between three and five days; sometimes six.

Q. And you can go back just as quick?

A. I suppose so.

Q. That would be, at the outside, twelve days?

A. You mean from here to Astoria and back?

A. Yes.

A. Well, I suppose between twelve and fifteen days, if you make proper connections.

Q. So you do know, now, don't you, that you were misinformed about its taking two months?

A. How is that?

Q. So you do know now that you were misinformed about its taking two months? [138]

A. To make the trip to Juneau and back to Astoria?

(Testimony of Enoch E. Mathison.)

Q. Yes.

A. Well, that was not my purpose to make the trip to Juneau and right back. I wasn't going to come here just to make the trip.

Q. I know it wasn't your purpose— A. Sir?

Q. I know it wasn't your purpose, but you found out that you could make the round trip in twelve days to two weeks, if you wanted to?

A. I have found out that you could make it in that time, but you couldn't do any investigating or do anything else. You could come as far as Juneau, but I understood, and since know, that Sitka and Chichagoff Island are not in Juneau. You may know better, but that is what I have been—

The COURT.—Never mind. You have made your explanation.

Q. Did you make any inquiry to find out what sort of boat service there was between Juneau and Sitka? A. Yes, sir.

Q. Did you find that there was a boat every week regularly on the run?

A. I found out from the Alaska Steamship Company that there was a boat—

Q. (Interrupting.) Well, just answer the question. A. Sir?

Q. Did you find out that there was a regular boat on the run that made round trips once a week?

A. No, sir.

Q. Did you find out, that in addition to that, some of the larger steamers call at Sitka during the summer months? [139]

(Testimony of Enoch E. Mathison.)

A. I did find out that they stopped there, but they were indefinite.

Q. So from all this you figured it would take two months of your time?

A. I figured it would take two months to make the trip and do the investigating properly, as I wanted to.

Q. So you didn't attempt anything? A. Sir?

Q. So you didn't attempt anything?

A. What do you mean by "attempt"?

Q. You didn't come or attempt to make an investigation? A. Oh, yes, I did.

Q. Did you come?

A. I didn't come, no; but I did attempt. That was your question.

Q. Well, how did you attempt to make any investigation at Sitka if you didn't come?

A. By sending Mr. Tuppela here.

Q. Oh, oh. That was in August or September?

A. Yes, sir.

Q. Prior to that, you didn't do anything?

A. Oh, yes, I did.

Q. What?

A. I investigated as near as, or as much as I could under the circumstances.

Q. I want to know what you did, not as much as you could. A. Well, I investigated—

Q. (Interrupting.) You weren't supposed to do anything very much down there, but what did you do?

A. I investigated Mr. — with Mr. Tuppela all

(Testimony of Enoch E. Mathison.)
that I could.

Q. You talked with Tuppela? [140]

A. Yes, sir.

Q. That was all?

A. That and with people that had been here.

Q. How is that?

A. With some of the people that had been here and had some information regarding his claims.

Q. Were you a particular friend of Mr. Tuppela?

A. No; not any more than just what I have stated.

Q. He was just a client, nothing more?

A. That is all. Of course, I had known him when I was a small boy.

Q. You knew nothing about his financial situation other than what he told you? A. No; I didn't.

Q. And the only motive you had in lending out this money that you say you let him have, was simply to accommodate him, was it?

A. Yes; that is what I would take it for.

Q. The fact that you had this contract with him had no inducing cause or anything? You would have lent it to him if you hadn't had the contract?

A. That never entered in my mind when I gave him the money.

Q. Never entered into it at all? A. No, sir.

Q. Would you have lent it to him if you hadn't had the contract with him?

A. I have loaned to quite a number of people—

Q. (Interrupting.) Well, would you have done it? A. That I don't know.

(Testimony of Enoch E. Mathison.)

Q. Don't you know that you wouldn't?

A. No; I don't. [141]

Q. You don't?

A. There is no reason why I shouldn't have loaned it to him.

Q. Are you in the habit of lending as much as \$362.50 to any man with whom you have no business relations, if they come and ask you for it?

A. Well, I have done it; yes.

Q. Is that your habit? A. Not usual habit; no.

Q. There was no friendship existing between you and you didn't know that the man had a dollar on earth? A. Put that again.

Q. Are you in the habit of lending as much as \$362.50 in one summer to any man that you don't know whether he has got a dollar in the world, and with whom you have no business relations?

A. No; I'm like you are, Mr. Cobb, I believed there was a chance of getting my money back.

Q. How is that?

A. There was a chance of the man being able to pay this money back to me. I'm not throwing any money away any more than you are.

Q. Well, answer the question. I'm not asking you for comparisons. Do you do that?

A. What was the question again?

A. I said, do you lend money to any man who comes along, with whom you have no contractual relations of any kind, no business connections, and who is in the same or similar situation that John Tuppela was in 1918?

(Testimony of Enoch E. Mathison.)

A. Well, if he will put up security, yes; I will loan it to him if I have the money.

Q. That isn't the question. Tuppela didn't put up security, did he? A. No. [142]

The COURT.—You make the question a little more definite, Mr. Cobb.

Mr. COBB.—Well, I think he has answered it now.

Mr. ROBERTSON.—I thought you said he didn't answer it.

Mr. COBB.—Well, he answered it in response to the next question. I think his meaning is plain.

Q. Did Tuppela ever ask you for any money before you had entered into this contract on March 11th? A. No, sir.

Q. And you took no security from him?

A. No, sir.

Q. And the loans had no connection with your employment as attorney? A. No, sir.

Q. You don't know whether you would have lent it if you hadn't been employed, or not?

A. That is problematical.

Q. Problematical? It was no part of the expense of the contemplated litigation, such as taking care of Tuppela until you could institute the suit and get the money? A. No, sir.

Q. And there was no agreement on your part nor talk in negotiating this contract, that you were to furnish the money to take care of Tuppela and for the expenses of the suit? A. Absolutely not.

Q. Absolutely not. Did you contemplate paying

(Testimony of Enoch E. Mathison.)

any part of the expenses yourself?

A. That never entered into the agreement at all.

A. Did you contemplate it? A. No, sir. [143]

Q. Contemplate paying any part of it yourself?

A. No, sir; not Tuppela's expenses. I might have contemplated paying my own fares, and so forth.

Q. The court costs and the necessary expenses of the litigation? A. No, sir.

Q. Didn't contemplate paying that?

A. No, sir.

Q. Contemplated that Tuppela would pay all that?

A. That Tuppela would put it up—all that.

Q. During the time that you knew Tuppela, did you ascertain the extent of his mental capacity?

A. In what—

Q. (Interrupting.) Didn't you find that he was a man of very weak mind

A. No; I found him pretty strong-minded.

Q. Capable of carrying on a sustained conversation or reporting a sustained conversation?

A. Yes, sir; on the subject that he was interested in.

Q. And a man of sufficient mental strength to interview a witness and report what he would testify to? A. Yes; he was able to do that.

Q. Did he appreciate the material importance of testimony in his case?

A. Yes, he did, in so far as his rights pertained to the property.

Q. How is that?

(Testimony of Enoch E. Mathison.)

A. In so far as his rights pertained to the mining property.

Q. He couldn't read or write, except his name.

A. Well, he could read—

Q. Writing? [144] A. How is that?

Q. Could he read English?

A. That I don't know.

Q. You don't?

A. No; I don't know whether I ever tested him on that.

Q. Could he read writing at all?

A. He read and wrote the Finnish language.

Q. Could he read handwriting in Finnish?

A. Why that is my impression now. I don't know whether—

Q. (Interrupting.) Now, Mr. Mathison, as a matter of fact don't you know that he couldn't read writing at all; that he could only read a little Finnish print? A. No; I don't.

Q. You don't know that? A. No, sir.

Q. Never found that out to be true?

A. Excepting my impression now is that he could read and write the Finnish language.

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. ROBERTSON.)

Q. Mr. Mathison, do you know where Mr. Tuppela expected to get money from to conduct the litigation, if there was any litigation required in this matter?

A. Yes, sir.

Q. From where did he expect to get it?

(Testimony of Enoch E. Mathison.)

A. Mr. August Nikula had promised him to aid in that way.

Q. Aid him where? A. Sir?

Q. Aid him where? [145]

A. In the case of litigation, if that were necessary.

Q. In doing what?

A. Paying expenses and so forth.

Q. Well—

A. (Interrupting.) That was my understanding; get it from his people.

Q. From what people?

A. From the Finnish people over there.

Q. Whereabouts?

A. Astoria, and I believe some of them are in Portland?

Q. Did Mr. Tuppela have any friends in Astoria?

A. Yes; he had.

Q. He did have. Well, now, was your relationship with him anything other than purely business?

A. That's all my relationship with him was.

Q. But you had known him for a good many years? A. Yes; I had known him before.

Q. Then, during this time, do you know whether he was also tendered money from any other sources during this period that you loaned him this \$362?

A. I don't know; he told me—

Q. (Interrupting.) What did he tell you?

A. He did tell me that he received some money from other Finnish people.

Q. Now, then, when he was figuring on coming

(Testimony of Enoch E. Mathison.)

back to Juneau or to Alaska, from where was he going to get transportation and his expense money to come back to Alaska, if you recall?

A. My understanding was that Mr. Nikula and the other people who were interested in him would supply it, if he needed it.

Q. I mean his steamship transportation? [146]

A. Oh, that was from the Sanitarium.

Q. What, if anything, did you have to do with that?

A. I had it postponed, or rather, had the time extended several times.

Q. Time for what extended?

A. The law, I guess, or rule of the Department is that you get your fare from the Government from the sanitarium back to the place where you were committed.

Q. I see.

A. But you must apply for that within six months and this having elapsed, over six months, I went and saw Doctor Coe in Portland.

Q. And did what?

A. Several times and had it extended.

Q. Now, then—I think you have covered that pretty thoroughly—Mr. Cobb asked you if you did anything else besides talk to Tuppela and you said you talked with Tuppela and other people. Now, did you do anything else besides talking to Tuppela, or holding consultations with Tuppela about this matter, or with these other people?

A. I looked—I examined those certified copies of

(Testimony of Enoch E. Mathison.)

the commitment papers as well as the proceedings of the guardian.

Q. Yes.

A. And I satisfied myself, as well as making that investigation of the law in connection with it, that the sale was void.

Q. What, if anything did you do about making an investigation as to the legal remedies that Tuppela had?

A. Well, I decided that if Tuppela had sustained his contention that the best thing to do would be to see the Chichagoff Mining Company and see what settlement could be had—what [147] acceptable settlement could be had. That would have been my first step. If not, then it would be to file suit at the most convenient and proper place. Now, that had not been settled at that time.

Q. Now, what advice did you give Tuppela?

A. I gave those advices.

Q. Now, Mr. Cobb asked you about an agreement, if Tuppela didn't talk to you about a previous agreement that he had with some attorney by the name of Davis, and I believe also with a man by the name of Clark in Portland. Now, what, if anything, did Tuppela tell you about that matter?

A. It is my custom—

Q. (Interrupting.) Well, now—

A. (Interrupting.) When he came to me, I asked him the first thing whether he had taken this matter up with any other attorney?

Q. What did he say? A. He said he had.

(Testimony of Enoch E. Mathison.)

Q. Well, now, then, did he tell you what the attorneys had told him?

A. I asked him—yes; he did.

Q. What did he say they told him?

A. They told him that his case was hopeless; that they couldn't take it.

Q. Now, then, what, if anything, did he ask you, then and there, in regard to your seeing them or not seeing them?

A. He didn't say anything regarding my seeing them.

Q. What, if anything, did you do after this talk about seeing them?

A. I wanted to ascertain from him about whether or not he was under contract with the other attorneys— [148]

Q. (Interrupting.) What did you do?

A. (Continuing.) And he told me that he had signed some papers.

Q. What did you do?

A. And I went then to Portland and saw Mr. Davis. I wanted to see him, but he wasn't in, and I saw Mr. Farrell.

Q. Who was Mr. Farrell?

A. Farrell was his partner.

Q. Did you later see Mr. Davis?

A. Mr. Farrell said he didn't know much about the case.

Q. Did you later see Mr. Davis? A. Yes.

Q. What was the result of that?

A. He said he had investigated the case; had

(Testimony of Enoch E. Mathison.)

written to Alaska and that he had no written agreement with Tuppela.

Q. What, if anything, did he say as to whether or not he had a contract with Tuppela?

A. He said that he didn't have any contract, but he had taken the matter up—under investigation.

Q. That he had taken—

A. (Interrupting.) Yes, and had investigated it.

Q. But that he had no contract at that time?

A. That is what he stated to me.

Q. Well, now, then, did you ascertain in any manner—and, if so, how—as to whether or not this other attorney, Mr. Clark, had any contract with Mr. Tuppela?

A. As I recall, Mr. Davis told me—

Mr. COBB.—(Interrupting.) We object to that. I haven't been objecting to this heretofore, but it's wholly hearsay.

The COURT.—Objection sustained. [149]

A. I did not take it up with Mr. Clark.

The COURT.—Never mind. The objection is sustained.

Q. Now, then, was it after you had ascertained as to whether or not those gentlemen had a contract that you entered into the contract with Mr. Tuppela that is in evidence in this case? A. Sir?

Q. Was it after that, after you had ascertained the status of those gentlemen as to any prior contract with Mr. Tuppela that you entered into the contract in this case, with Mr. Tuppela?

(Testimony of Enoch E. Mathison.)

A. Yes; about two months afterward.

Q. Now, on this question, Mr. Mathison, that Mr. Cobb interrogated you about in that letter of July 7, 1920, wherein you stated to Mr. Tuppela that he had left for parts unknown, just explain what you meant by that?

Mr. COBB.—I object to that. The letter speaks for itself. The witness can't— There is no ambiguity about that.

The COURT.—Objection overruled. You may state.

A. Well, I meant this: that I had written to him and having not heard from him, except simply indirectly—

Q. (Interrupting.) Whereabouts had you written to—whereabouts? A. To Sitka and Juneau.

Q. And you had heard nothing from him?

A. Had not heard from him.

Q. Did you, or did you not, know generally where Mr. Tuppela was going when he left Astoria the latter part of August, 1918?

A. Oh, yes; yes, I knew that.

Q. Whereabouts was he going to?

A. To Juneau, Sitka and to Chichagoff Island.
[150]

Q. Now, then, Mr. Cobb asked you if you ever wrote to either him or Mr. Tuppela after the Clerk of the Court had responded to your letter to him under date of February 20th, in which the Clerk had advised you that a few days prior to the receipt of your letter, that the case had been decided

(Testimony of Enoch E. Mathison.)

in this court against Mr. Tuppela. Do you recall Mr. Cobb's calling your attention to that—asking you about that? A. Yes, I recall that.

Q. Now, did Mr. Cobb or Mr. Tuppela ever write you, either write or in any otherwise communicate with you in which they either requested that you should participate in the recovery, offered that you should participate in the recovery in this suit, if you took part in it, or in which they demanded or asked you to take part under your contract or put up any costs whatsoever?

Mr. COBB.—We object to that. In the first place it is not proper cross-examination and in the next place, there is no issue of that kind. It's utterly irrelevant and immaterial. Neither Tuppela nor his attorneys at that time thought for a moment that this man had any interest in the case.

Mr. ROBERTSON.—Well, of course, that hasn't been proved yet, but Mr. Cobb, if the Court please, asked Mr. Mathison—

Mr. COBB.—(Interposing.) If he offered to do it.

Mr. ROBERTSON.—If he offered to do it. Why shouldn't we in turn have the right to ask Mr. Mathison whether or not they— We put in evidence correspondence showing that Mr. Cobb was written to—that Mr. Cobb wrote to Mr. Mathison, and there is certainly nothing in the evidence, so far, that Mr. Mathison knew who Mr. Cobb was, and yet Mr. Cobb, in those letters or otherwise, made no offer to call him in [151] to participate,

(Testimony of Enoch E. Mathison.)

or call upon him to share in the expenses, It seems to me we have a right to show whether or not Mr. Mathison ever got such a demand or request or offer.

The COURT.—I think that that has all been testified to in his examination in chief. Not proper redirect examination. Mr. Mathison has already testified that he never heard directly or indirectly. That covers the matter. I think that it is not proper cross-examination.

Mr. ROBERTSON.—I take an exception.

The COURT.—(Continuing.) Or redirect examination.

Q. There is one question that may possibly be reiteration. I will ask you at this time, Mr. Mathison, as to whether or not you ever had any reply from Mr. Cobb or from anyone on behalf of Mr. Cobb or Mr. Tuppela, to your letter of February 20th, to Mr. J. H. Cobb, Juneau, Alaska, Plaintiff's Exhibit No. 8, in this case?

Mr. COBB.—He has already testified that he didn't get any answer to it. A. No, sir.

The COURT.—Strike out the answer, until I hear your objection.

Mr. COBB.—How is that.

The COURT.—I told the reporter to strike out the answer until I hear your objection.

Mr. COBB.—I didn't hear the answer, but he has already testified to it once.

The COURT.—Yes. You withdraw your objection?

(Testimony of Enoch E. Mathison.)

Mr. COBB.—Yes; let his answer stand.

Q. Now, Mr. Mathison, Mr. Cobb interrogated you at some length [152] as to the business of your affairs during that time after this contract was entered into. I will ask you to state whether or not there was ever contemplated, in the agreement which you entered into with Mr. Tuppela, anything that required you to come to Alaska?

Mr. COBB.—I object to that as calling for a conclusion of the witness? That is for the jury to say.

The COURT.—Objection sustained.

Mr. ROBERTSON.—We take an exception, if the Court please.

Q. Now, you stated this morning that Mr. Tuppela left no papers with you when he came to Alaska. Did Mr. Tuppela have you at that time—What, if any, papers did Mr. Tuppela have at that time relative to the mining claims as distinguished from the proceedings in Sitka under which the claim was sold or had a guardian appointed for him?

A. He had the commitment papers—

The COURT.—(Interrupting.) He asked you—

Mr. ROBERTSON.—(Interrupting.) Wait a minute.

The COURT.—He asked you what papers other than those commitment papers?

A. I didn't know that he had any other papers.

Q. Was that one of the purposes, if you know, that he was going to Alaska for? A. What—

Mr. COBB.—That has already been testified to.

Mr. ROBERTSON.—Simply ask the right to

(Testimony of Enoch E. Mathison.)

show this; it's a little doubtful question. It may be repetition, but it won't take just a moment.

Mr. COBB.—Go ahead; I withdraw my objection.

The COURT.—You may answer. [153]

A. What papers he came for?

The COURT.—No. What was his purpose in coming to Alaska?

A. His purpose in coming to Alaska was to get certain papers that pertained, tended to show what labor he had performed on these claims.

Q. Those are the papers that you refer now to, the papers that you referred to in your direct examination that he left in a cabin at Sitka?

A. Those are the papers; yes.

Q. Now, so far as the commitment papers are concerned, Mr. Mathison, why didn't he leave the commitment papers with you?

Mr. COBB.—Well, now, we object to that.

Mr. ROBERTSON.—I withdraw it, then.

Q. I will ask you, did you have, in addition to the copy of the commitment papers that he had, did you have a certified copy that you obtained yourself? A. I had a certified copy.

Q. And those are Plaintiff's Exhibit 4 in this case? A. Yes, sir.

Q. Now, about these witnesses at Juneau and Sitka, Mr. Mathison, as I understood it, you didn't mean to—did you, or did you not, mean to say that it would necessarily take two months of actual travel to go from Astoria to Sitka and return, or did you contemplate that it would take two months

(Testimony of Enoch E. Mathison.)

of travel and investigation that you felt it would be necessary for you to make up here?

A. I figured that it would take two months to make the round trip and investigate as to these partners, these parties that were partners of Mr. Tuppela, as the steamship company informed me that—

Mr. COBB.—(Interrupting.) I object to that. That's hearsay. [154]

The COURT.—Yes.

Mr. COBB.—And not responsive to the question.

The COURT.—Yes; not what the steamship company told you.

Recross-examination.

(By Mr. COBB.)

Mr. COBB.—There is one or two questions that I omitted to ask that is not proper recross-examination, and I ask permission to ask them now.

The COURT.—You may ask them.

Q. You stated that when you received my letter in the summer of 1919, you didn't know anything about who I was—whether I was an attorney or not? A. Yes, sir.

Q. Have you any such reference books in your library as Martindale's Legal Directory of the United States? A. I have.

Q. Did you glance at that to see whether my name appeared in it as an attorney? A. No, sir.

Q. Wasn't enough interested?

A. Well, the letter-head threw me off entirely.

Q. The letter-head threw you off entirely.

(Testimony of Enoch E. Mathison.)

A. Yes.

Q. Have you in your office a list of the members of the American Bar Association?

A. I don't think so.

Q. You haven't that. You made no effort to find out, then? A. No.

Q. Who, from references such as that, J. H. Cobb of Juneau, Alaska, was? [155]

A. No; that letter-head certainly threw me off.

Q. Well, just answer the question. You made no effort to find out anything about it? A. No, sir.

Q. And you didn't answer the letter?

A. I answered to Mr. Tuppela.

Q. You didn't answer it to Mr. J. H. Cobb, though? A. No, sir; I didn't.

Q. Now, then, coming back, did you state, did I understand you to state that, when the clerk wrote you that the case had been lost, that you wrote to Mr. Tuppela or to me?

A. I wrote to you at the same time that I wrote to the Clerk.

Q. At the same time? A. Yes, sir.

Q. I misunderstood you. I thought you wrote to me after you received the Clerk's letter?

A. No; I believe not.

Q. You didn't write to anybody after you received that letter? A. After that?

Q. Yes.

A. I expected to hear from you. You were the attorney and I expected to hear from you.

Q. And you didn't get an answer, you say?

(Testimony of Enoch E. Mathison.)

A. I did not.

Mr. COBB.—That's all.

Mr. ROBERTSON.—That's all.

(Whereupon a short recess was taken.)

Mr. ROBERTSON. — (Examining papers.)

Well, now, of course, that isn't really complying with my demand. Counsel has given me a rough statement of what he says is the amount, which, [156] of course, I am not at this time denying. I am not in a position to deny it or refute it, but, of course, what I wanted was the original papers showing the payments made to Mr. Tuppela or to Mr. Cobb as his trustee, so that we could arrive at the value of this property which Mr. Tuppela recovered from the Chichagoff Mining Company.

Mr. COBB.—I told counsel I could get all that if I had the time, and I gave him the result that I have carried forward on my books as trustee, showing, to a cent, in fact, to the half cent, what I have received as trustee for John Tuppela, from that property. I don't know what more he wants unless he wants to go through those reports and verify my statements.

The COURT.—Is the statement sworn to?

Mr. ROBERTSON.—No, sir.

Mr. COBB.—How is that?

The COURT.—I asked if the statement was sworn to.

Mr. COBB.—No; I just took it off there.

Mr. ROBERTSON.—Of course, it puts me in the position of having to put Mr. Cobb on as a

witness and, of course, naturally he is hostile. Of course, I'm adverse counsel.

The COURT.—You may call Mr. Cobb if you so desire, as to the amount.

Mr. ROBERTSON.—Before I call Mr. Cobb I now offer in evidence, if the Court please, a certified copy of the decree on the mandate in case No. 1841—A, John Tuppela against the Chichagoff Mining Company, a corporation, defendant, appellee.

Mr. COBB.—I object to it as irrelevant and immaterial to any issue in the case.

Mr. ROBERTSON.—Well, it seems to me it is a very proper and [157] relevant piece of evidence in this case. It shows that the decree of this court is—formal decree or judgment, and it shows what Mr. Tuppela has recovered and it goes on to show what he hasn't recovered. Now, I don't know how we can have better evidence. Of course, I intended to offer in conjunction with that, the original agreed settlement of accounting, as the agreed settlement of accounting covers one portion of that decree.

Mr. COBB.—The point is, you don't need any evidence on it. Simply encumbering the record. They plead the substance of that decree and we admit it.

The COURT.—The substance of the decree was admitted in the pleadings, so there is no issue on it.

Mr. COBB.—I found the original trust—recorded trustee's deed, which I have produced. I though I put it in the land office. When he is ready

to offer it, I have some objections to it. I am not admitting them for the reason that I don't think they are competent evidence.

The COURT.—I didn't understand you, Mr. Cobb.

Mr. COBB.—I said that these figures, I didn't want the Court to get the impression that I was admitting them in evidence without objection. I have some good and sufficient objections to them, I think.

Mr. ROBERTSON.—Now, if the Court please, I now offer in evidence the agreed settlement of accounting, the original which counsel produced, as your Honor recalls, this morning under agreement and of which I have a copy here—the copy may be substituted in place of the original and the original returned to Mr. Cobb—and I offer that agreed settlement of accounting in evidence. [158]

Mr. COBB.—We object to it for the reason that it is irrelevant and immaterial. This is a settlement brought about by other counsel in a case with which these gentlemen admittedly had not the slightest connection, either as original or associate counsel or in any other way.

The COURT.—I'll hear from you on that.

Mr. ROBERTSON.—It shows if the Court please, that the decree on the mandate provided that an accounting should be taken; that the parties to the case entered into the agreed settlement of accounting under the decree, in which they fixed certain amounts to be taken under the accounting, under the decree. If your Honor glances at the

(Testimony of John R. Winn.)

agreement itself, I think you will see how it becomes material.

The COURT.—And this is in the nature of an accounting to arrive at the question of damages?

Mr. ROBERTSON.—Yes; your Honor, in that case under the decree.

The COURT.—Objection overruled.

(Whereupon said document was received in evidence and marked Plaintiff's Exhibit No. 12.)

Testimony of John R. Winn, for Plaintiff.

JOHN R. WINN, called as a witness on behalf of the plaintiff, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. ROBERTSON.)

Q. Judge Winn, your name is John R. Winn?

A. Yes, sir.

Q. And you are an attorney at law?

A. Yes, sir.

Q. And you were one of the counsel in the case of Tuppela vs. [159] the Chichagoff Mining Company, tried in this court, in which Mr. John H. Cobb was the other counsel?

A. I was one of the attorneys.

Q. Are you here under a subpoena, Judge Winn?

A. How is that?

Q. Are you here under a subpoena?

A. Yes, sir.

(Testimony of John R. Winn.)

Q. Now, Judge Winn, I will ask you to state whether or not you are familiar with the various matters that were entered into in the Tuppela vs. the Chichagoff Mining Company case, relative to decrees, and so forth?

A. Well, somewhat; yes.

Q. Now, I will ask you to state whether or not shortly after the date of the decree on the mandate in that action, a one-quarter interest in the Over-the-Hill lode mining claim was conveyed to you?

A. Why there was a one-quarter's interest of whatever we won in that case, so far as real mining property was concerned, deeded to me and one-fourth, I think, to Mr. Cobb; but just what the claims consisted of, without refreshing my memory now, I couldn't tell you.

Q. Did that one-quarter interest include the Over-the-Hill, the Porphyry, the Pacific and the Golden West and the Rising Sun?

A. Well, as I said before, Mr. Robertson, I couldn't tell you exactly without looking at the instrument itself. It has been some time ago, but Mr. Cobb and I were to have a one-half interest in whatever claims we established his right to.

Q. That Mr. Tuppela recovered?

A. That we established any right to Mr. Tuppela. We were to have a [160] one-half interest—one-quarter each.

Q. And you did get a one-quarter interest?

A. We got a one-quarter interest.

Q. Did you sell your one-quarter interest to any

(Testimony of John R. Winn.)

one? A. I did dispose of it.

Q. Whom did you sell it to?

A. I disposed of it to Mr. Cobb and Mr. Ooghe, my partner.

Q. At what price did you sell to them, your one-quarter interest—what consideration, money consideration?

A. As I remember it, I think Mr. Cobb—well, I think Mr. Cobb paid me \$16,000 and Mr. Ooghe two. That would make \$18,000 for the quarter interest.

Q. Was there any additional consideration to Mr. Ooghe for past services that was also embraced in that sale?

A. No, I think I paid Mr. Ooghe separate and apart. I had given him some fractional part of the fee I had earned and then I had given Mr. Ooghe, I think, a tenth interest in my share.

Q. That was aside from the \$18,000; is that correct?

A. That is the way I remember it; yes. I think the consideration was, as we figured it to be, \$20,000 for the quarter interest. Q. Yes, sir.

A. And Mr. Ooghe already possessed one-tenth of mine, which would be \$2,000 off of the \$20,000, and that would reduce it to \$18,000, and I think Mr. Cobb paid me \$16,000 out of that and Mr. Ooghe two, if my memory is right.

Q. Was that the value arrived at between you and Mr. Cobb at that time?

A. Well, there was considerable dickering going on and we [161] finally settled on that price.

(Testimony of John R. Winn.)

Cross-examination.

(Mr. COBB.)

Q. You don't know whether you made a good or bad trade, do you?

A. Well, I'm not sorry about it.

Mr. COBB.—I would ask permission to recall the Judge later on a question or two.

Mr. ROBERTSON.—Of course, I don't know the nature of the question.

The COURT.—It is very much out of order, Mr. Cobb.

Mr. COBB.—I know it is.

Mr. ROBERTSON.—I will now read to the jury Plaintiff's Exhibit No. 11:

Plaintiff's Exhibit No. 11.

“In the District Court for the Territory of Alaska,
Division Number One, Juneau.

“No. 1841—A.

“JOHN TUPPELA,

Plaintiff,

vs.

“CHICHAGOFF MINING CO., a Corporation,
Defendant.

“DECREE ON THE MANDATE OF THE
UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE NINTH CIRCUIT.

“This cause came to be heard upon the mandate of the Honorable, the United States Circuit Court of Appeals of the Ninth Circuit, which mandate is in words and figures as follows, to wit:

“UNITED STATES OF AMERICA,—ss.

The President of the United States of America,
To the Honorable the Judge of the District
Court of the United States for the District of
Alaska, Division No. 1. GREETING: [162]

“WHEREAS, lately in the District Court of the United States for the District of Alaska, Division No. 1, before you, or some of you, in a case between John Tuppela, plaintiff, and Chichagoff Mining Company, a corporation, defendant, No. 1841—A, a decree was duly filed and entered on the 25th day of February, A. D. 1920, in the words and figures following, to wit:

“ “This cause having been duly heard on the pleadings and evidence adduced at the trial and the Court having rendered its written opinion and made findings of fact and conclusions of law, from which it appears that defendant is entitled to a decree dismissing the bill of complaint herein, with costs, now, therefore,

“ “IT IS ORDERED, ADJUDGED AND DECREED that the bill of complaint herein be, and the same is hereby dismissed with costs.

“ ‘Done in open court this 25th day of February, 1920.

“ ‘ROBERT W. JENNINGS,

“ ‘Judge.’

“which said decree is of record and fully set out in said cause in the office of the Clerk of the said District Court, to which record reference is hereby made and the same is hereby expressly made a part hereof, and as by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by John Tuppela as appellant against the Chichagoff Mining Company, a corporation, as appellee, agreeably to the act of Congress in such cases made and provided, fully and at large appears:

“AND WHEREAS, on the 18th day of May, in the year of our Lord one thousand nine hundred and twenty, the said cause came on to be heard before the said Circuit Court of Appeals, on the said transcript of the record, and was duly [163] argued and submitted,

“ON CONSIDERATION WHEREOF, it is now here ordered, adjudged, and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is reversed, with costs in favor of the appellant and against the appellee, with directions to the said District Court to enter a decree adjudging the appellant to be the owner as

against the defendant to the suit of the whole of the Rising Sun lode mining claim, and of an undivided one-half interest in the Over-the-Hill and Pacific Lode Mining claims, and directing a conveyance to him by the defendant to the suit of the legal title to the undivided one-half interest in the said Over-the-Hill claim conveyed to it by the Government patent, and for an accounting of all ore extracted by the defendant from the said Over-the-Hill claim, and for judgment in favor of the appellant for one-half of the value thereof, less one-half of the legitimate expenses of mining, extracting and reducing such ore, and for an accounting of the whole of the value of the ore extracted by the defendant from the said Rising Sun claim, and for judgment therefor, less the legitimate expenses of mining, extracting and reducing such last-mentioned ore, and for costs of suit.

“It is further ordered, adjudged and decreed by this Court that the appellant recover against the appellee for his costs herein expended, and have execution therefor (July 6, 1920).

“YOU, THEREFORE, ARE HEREBY COMMANDED THAT SUCH execution and further proceedings be had in the said cause in accordance with the opinion and decree of this Court, and [164] as according to right and justice and the laws of the United States ought to be had, the said decree of the said District Court notwithstanding.

“WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States,

the 16th day of November, in the year of our Lord one thousand nine hundred and twenty.

(Signed) "F. D. MONCKTON,

"Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

"By Paul P. O'Brien, (Signed)

"Deputy Clerk.

"Amount of costs allowed and taxed in favor of the appellant and against the appellee, as per annexed bill of items, taxed in detail, \$1281.75.

"It is, therefore, considered by the Court and it is ordered, adjudged, and decreed, that the said decree of this Court made and entered herein on February 2, 1919, be and the same is hereby annulled and set aside.

"It is further ordered and decreed that the plaintiff, John Tuppela, is the owner, as against the defendant, the Chichagoff Mining Company, a corporation, of an undivided one-half interest in and to those two certain lode mining claims situated at or near Chichagoff Island, Alaska, known as and called the Over-the-Hill, and Pacific Lode Claims, and of the whole of that certain lode mining claim situated at or near Chichagoff on Klag Bay, on the west side of said Chichagoff Island, Alaska, and adjoining the Over-the-Hill claim on the west end thereof, known as and called the Rising Sun lode claim.

"It is further ordered, adjudged and decreed, that the [165] defendant, the Chichagoff Mining Company, a corporation, holds the title by patent from the United States, dated January 3, 1919, to

the said Over-the-Hill claim to the extent of an undivided half thereof, in trust for the plaintiff, John Tuppela, and it is hereby ordered and directed to execute a good and sufficient conveyance thereof to the plaintiff.

“It is further ordered, adjudged and decreed, that the defendant, the Chichagoff Mining Co., render to the plaintiff an account of all ores extracted from the said Over-the Hill claim, and pay to him one-half the value thereof, less one-half the legitimate expenses of mining, extracting and reducing such ores; also an accounting for all the ores extracted from the Rising Sun Lode claim, and pay to him the whole of the value thereof, less the legitimate expenses of mining, extracting and reducing such ore.

“It is further ordered and adjudged that the plaintiff, John Tuppela, do have and receive of and from the defendant, the Chichagoff Mining Co., the sum of Twelve Hundred and Eighty One and 75/100 (\$1281.75) dollars, costs of, and upon said mandate, and all costs and disbursements of this Court to be taxed by the Clerk, for all of which execution may issue.

“It appearing to the Court from the record and files herein, that the conveyance herein ordered to be made has been duly executed by the defendant, and that the parties have taken the accounting ordered, and the defendant has paid to the plaintiff the moneys due thereon, this decree is adjudged

satisfied, except only as to the costs aforesaid.
[166]

“Dated this first day of December, 1920.

“ROBERT W. JENNINGS,

“Judge.”

“O. K.—H. L. FAULKNER,

“Attorney for Defendant.

“Entered Court Journal No. Q, pages 140-41-42.

“Entered Court Journal No. D, pages 2, 3, 4.

“Filed in the District Court, District of Alaska,
First Division. December 1, 1920. By J. W. Bell,
Clerk. By ———, Deputy.”

Mr. ROBERTSON.—Defendant’s Exhibit No. 12
is as follows:

The COURT.—Plaintiff’s Exhibit No. 12.

Mr. ROBERTSON.—Plaintiff’s Exhibit No. 12;
yes.

Mr. COBB.—We make the same objection to this
—irrelevant and immaterial for any purpose.

Mr. ROBERTSON.—Well, that has already been
ruled on. You have that objection in the record.

Mr. COBB.—Not to this, but to the other.

The COURT.—You may read it.

Mr. COBB.—Note an exception.

Mr. ROBERTSON.—(Reads:)

Plaintiff's Exhibit No. 12.

“In the District Court for the District of Alaska,
Division No. One, at Juneau.

“No. 1841—A.

“JOHN TUPPELA,

Plaintiff,

vs.

“CHICHAGOFF MINING COMPANY, a Corpo-
ration,

Defendant. [167]

“AGREED SETTLEMENT OF ACCOUNTING.

“This agreement made by and between John Tuppela, plaintiff, and the Chichagoff Mining Company, defendant, Witnesseth:

“The parties hereto have taken the accounting ordered in the decree herein, and have agreed upon the sum due thereunder as Three Hundred Thousand (\$300,000.00) Dollars.

“It is agreed that the defendant shall pay the costs as adjudged in said decree, and the plaintiff agrees not to tax costs above or in excess of \$2500.00 in both courts.

“The defendant has paid this day to the plaintiff the sum of One Hundred and Fifth Thousand (\$150,000.00) Dollars, the receipt of which is hereby acknowledged, and agrees to pay the balance of One Hundred and Fifth Thousand Dollars (\$150,000.00) into the Bank of California at Seat-

tle, Washington, to be credited as follows: to John R. Winn Thirty-Seven Thousand Five Hundred (\$37,500.00) Dollars; to John H. Cobb one Hundred Twelve Thousand Five Hundred (\$112,500.00) Dollars on January 2d, 1921, and also the costs to be taxed in the decree.

“Dated this November 24, A. D. 1920.

“JOHN TUPPELA,

“J. H. COBB,

“Trustee for John Tuppela.

“CHICHAGOFF MINING CO.,

“By W. R. RUST,

President.

“H. L. FAULKNER,

“Attorney for Defendant.

“JNO. R. WINN,

“J. H. COBB,

“Attorneys for Plaintiff.” [168]

Mr. ROBERTSON.—I now offer in evidence the certified copy of the motion for an injunction, in case No. 1841—A, John Tuppela vs. the Chichagoff Mining Company, wherein certain facts are stated relative to the value of the property in question.

Mr. COBB.—I don't know what the gentleman's offering them for. It is wholly irrelevant and immaterial to any issue in this case.

The COURT.—Let me look at it.

Mr. ROBERTSON.—The second page is what we want to put in. Before the Court rules I want to say a word or two as to my theory for the admission of the affidavit.

The COURT.—I'll hear from you, Mr. Robertson:

Mr. ROBERTSON.—Well, of course, we have now put in evidence, if the Court please, the decree on the mandate and also an agreed settlement between the parties. Now, it is possible that that is sufficient, but we have in the evidence an affidavit made by counsel for Tuppela and also by one of the defendants in this case, in which he states that the value of this is so much—the value of the recovery which they were seeking. Now, of course, in this case, it is very evident that the plaintiff necessarily labors under considerable difficulty to prove what the value of the recovery was; that is to say, it lies more in the breast of the defendants and within their knowledge to say what the value of this property was that they recovered than it does in ours. The best way we can get at that is to show the admissions that they made at the time when they were not seeking to defend themselves, but when they were seeking to recover. Now that statement, so made on information and belief in that case—it was after the trial, at the conclusion [169] of the trial that the affiant says in that case that there was so much. Now, I don't mean to say that that figure is binding, but it seems to me that it ought to go to the jury, for the jury to take that into consideration—that at one time they said that the value of this was so much; that is, their proportionate share would be one-half of the amount that they stated therein.

The COURT.—The exhibit was established by the evidence in that case?

Mr. COBB.—It only amounts to an opinion of an attorney in the case.

Mr. ROBERTSON.—That may be but—

Mr. COBB.—(Interrupting.) He is not an expert on values and not a mining man.

The COURT.—Well, you are one of the defendants in this case, aren't you?

Mr. COBB.—Only in a representative capacity, and wrongfully and illegally a party at that, as I will show the Court at the proper time. I have got no business to be a party to this suit. Tuppela got \$300,000; that is, there was that much paid in the settlement of the case, and he recovered his property. Now, there is a very easy way of getting at it, as near as you can get at it, and they have shown that a quarter interest in that property sold for \$20,000, which would make Tuppela's half interest in the property \$40,000. Now, I don't see how they can take my opinion based upon testimony that was adduced at the time of the trial.

The COURT.—I think I'll sustain the objection.

Mr. ROBERTSON.—We will ask to have it marked, if the Court [170] please, until we can properly reserve an exception.

The COURT.—You may.

(Whereupon said document was marked Plaintiff's Exhibit No. 3 for Identification.)

Mr. ROBERTSON.—I now offer in evidence a certified copy of the assignment of errors in the

case of John Tuppela vs. the Chichagoff Mining Company, a corporation, plaintiff, in which the defendant in this case (in that case the plaintiff) admits, as we claim, the value of this property. Now, of course, if counsel objects to that on the ground that—I haven't offered all the assignments of error. They are very voluminous, and I simply had the clerk take one of them, assuming that counsel wouldn't raise any objection on that particular point.

Mr. COBB.—They have an assignment of error there in which we ask for certain finding from Judge Jennings, and the Judge refused it and we assigned that refusal as error. We asked for a judgment for a certain sum—"find that he was entitled to judgment for a certain sum." Now, they have offered that to show the value of the property because we asked for it.

Mr. ROBERTSON.—You certainly didn't admit that it was less than what you—

The COURT.—(Interrupting.) I'll sustain the objection for that reason; that it is wholly an opinion.

Mr. COBB.—Amounting to an opinion.

Mr. ROBERTSON.—I will ask that that be marked for identification and reserve an exception to its rejection.

(Whereupon document was marked Plaintiff's Exhibit No. 4 for Identification.)

Mr. ROBERTSON.—I now offer in evidence a certified copy of [171] an affidavit of John Tup-

(Testimony of John R. Winn.)

pela, made in case No. 2026—A, Henry Lepisto, Plaintiff, vs. J. H. Cobb, Trustee, and Chichagoff Mining Company, Defendants.

Mr. COBB.—I object to it as wholly irrelevant and immaterial. What is the purpose of it?

Q. (Mr. ROBERTSON.) Certain admissions made by plaintiff John Tuppela, or the defendant John Tuppela in that case, which are relevant in this case. Affidavit made before his own counsel in the case.

Mr. COBB.—Yes; but the facts set up in it are wholly irrelevant and immaterial. Oh, I think I'll withdraw the objection and let them read it. There are some things in there I would like to go to the jury myself.

The COURT.—Very well, if you withdraw the objection.

(Whereupon said affidavit was received in evidence and marked Plaintiff's Exhibit No. 13.)

Mr. ROBERTSON.—Certified copy. I will not read the Clerk's certificate. (Reads:)

Plaintiff's Exhibit No. 13.

“United States of America,

“Territory of Alaska,—ss.

“John Tuppela, being first duly sworn on oath, deposes and says: I am one of the defendants in the suit of Henry Lepisto vs. John Tuppela et al. I was also the plaintiff in the case of John Tuppela vs. Chichagoff Mining Company referred to in the

complaint in said first-mentioned cause. I have heard read the complaint in the cause of Lepisto vs. Tuppela, et al. The allegations therein that I promised and agreed to pay Henry Lepisto one-half of the money or property I might recover in the case of Tuppela vs. Chichagoff Mining Company is absolutely untrue. I never agreed to give him anything for any services he assumed to render to me nor did he ever ask me for anything. I met Lepisto first, as I [172] recall it, in the month of December, 1918. He was never recommended to me by anyone, but introduced himself as a countryman. He seemed to have learned that I had a claim against the Chichagoff Mining Company, and at his instance I went with him to the office of Judge J. R. Winn in Juneau and about the early part of January Judge Winn agreed to represent me in said suit as my counsel. Judge Winn also agreed to provide for my room and board while in Juneau, which he did. I never before heard that Lepisto had anything to do with my room and board.

“About March 13, 1919, I went to the Pioneers’ Home in Sitka, Alaska, and remained there until the first day of May, 1919, when I returned to Juneau, being sent for by J. H. Cobb, who I subsequently learned had been called into the case in my behalf by Judge Winn. It is true that in May, 1919, about the time of my return to Juneau, Henry Lepisto, without any suggestion from me, but as I understood it, at the request of Judge Winn, attempted to interpret for me in stating my case to

Mr. Cobb, but he was utterly unable to do so because of his ignorance of the English language. Such interpretation was thought necessary at the time, not because I could not express myself in English, but because of an impediment in my speech due to the loss of my front teeth and my inability to enunciate distinctly. During all this time Lepisto expressed a friendly interest in my case and seemed desirous of seeing me win, but he never rendered me the slightest assistance of any kind so far as I am aware, except that he did volunteer and was permitted to go to Chichagoff in July, 1919, as a chain carrier when the mine was surveyed under order of the Court. But as I understood [173] from my attorney, Mr. Cobb, Lepisto asked to go, as he was not working at the time, and wanted the trip.

“JOHN TUPPELA.”

“Subscribed and sworn to before me this the 29th day of December, 1920.

“[Notarial Seal]

J. H. COBB,

“Notary Public in and for Alaska.

“My commission expires June 8, 1923.”

Mr. ROBERTSON.—I now offer in evidence this counter-affidavit of John Tuppela, Plaintiff's Exhibit No. 1, which counsel objected to this morning. Your name is on the back of it.

Mr. COBB.—I object to it as wholly irrelevant and immaterial to any issue in this case.

The COURT.—What is the purpose of this.

Mr. ROBERTSON.—Why the purpose of that

is to show that—We have contended in this case, and Mr. Mathison has so testified, that he advised Mr. Tuppela not to accept any money which Mr. Mills might offer him or to enter into any arrangement for releasing or discharging Mr. Mills until he had first consulted with him. Now, of course, we realize that some of these matters are simply circumstantial, but here is an affidavit made at a time long before this case was brought in which, I would call your attention to the significant language used in the very last sentence particularly, which, it seems to us, is one of the circumstances that should go to the jury.

The COURT.—You object?

Mr. COBB.—Yes; I object to it. (Examines affidavit.) There is nothing in here—

The COURT.—(Interrupting.) Well, I don't care about any statement. Do you object?

Mr. COBB.—Yes; I object to it. It is irrelevant and immaterial. [174]

The COURT.—I sustain the objection.

Mr. ROBERTSON.—We'll ask, if the Court please, to have it marked for identification and reserve an exception to it.

The COURT.—You may take your exception.

(Whereupon said affidavit was marked Plaintiff's Exhibit No. 1 for Identification.)

Mr. ROBERTSON.—We now offer in evidence, if the Court please, a certified copy of the reply to the amended answer in case No. 1841—A, John Tuppela, plaintiff vs. the Chichagoff Mining Com-

pany, a corporation, defendant, made by the defendant John Tuppela before the defendant J. H. Cobb.

Mr. COBB.—I object to that as irrelevant and immaterial; an allegation in the pleadings, sworn to upon information and belief, necessarily so, being but an estimate of a value that would be due on an accounting. And besides, it is not the best evidence. It's been adjudicated what that amount was and they have got that in the record—because we at one time overestimated what the court allowed us. It's not evidence that the first amount is correct—irrelevant and immaterial for any purpose.

Mr. ROBERTSON.—I don't recall that it was made on information and belief. Perhaps it was. I don't recall that it was made on information and belief.

The COURT.—I think the statement of the defendant John Tuppela in his answer in that case—I'll allow it. I'll overrule the objection and allow it to be introduced in evidence for what it is worth.

(Whereupon said certified copy of reply in case mentioned was received in evidence and marked Plaintiff's Exhibit No. 14.)

Mr. ROBERTSON.—Is it satisfactory to waive the reading of that at this time, Mr. Cobb? [175]

Mr. COBB.—Yes.

Mr. ROBERTSON.—It can be read before the jury.

Mr. MANNIX.—You admit that you made practically the same agreement?

Mr. COBB.—No, I don't. I didn't make any such

agreement as that.

Mr. ROBERTSON.—We'll offer it in evidence, if the Court please.

Mr. COBB.—How is that?

Mr. ROBERTSON.—We offer it in evidence. Any objection?

Mr. COBB.—No.

The COURT.—This is the original?

Mr. COBB.—Yes; that is the original. I would like to keep that.

Mr. ROBERTSON.—We'll ask that the clerk make a certified copy of it.

Mr. COBB.—I don't care about having it certified. Just make a copy.

(Thereafter, a certified copy of a contract and agreement between John Tuppela and John R. Winn and J. H. Cobb, dated May 9, 1919, was received and marked Plaintiff's Exhibit No. 15.)

Mr. ROBERTSON.—In the pleadings, Mr. Cobb, my recollection is that the trust agreement was made on August 26, 1920. (Counsel hands agreement to Mr. Robertson.)

Mr. ROBERTSON.—I now offer to read in evidence, if the Court please, the deposition of—

Mr. COBB.—(Interrupting.) Has the contract between Tuppela and Winn and myself been received in evidence?

Mr. ROBERTSON.—Yes; received and marked in evidence, and I asked the clerk to make a copy.

I will now read the deposition of Lauri Moilanen.

(Deposition of Lauri Moilanen.)

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB as Trustee for
John Tuppela, and GROVER C. WINN as
Guardian of the Person of John Tuppela,
Defendants.

State of Massachusetts,
County of Worcester,—ss

Deposition of Lauri Moilanen, for Plaintiff.

Be IT REMEMBERED That on this 14th day of June, 1922, before me, a Justice of the Peace in and for the state of Massachusetts, County of Worcester, personally appeared, in pursuance to the annexed commission, Lauri Moilanen, a witness on behalf of the plaintiff Enoch E. Mathison in the above-entitled action, and that thereupon, after said witness was by me first duly sworn on oath to tell the truth, the whole truth and nothing but the truth, I did propound to said witness the interrogatories hereunto attached and thereupon the said witness made answer to said interrogatories as hereinafter set forth, to wit:

(Deposition of Lauri Moilanen.)

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB, as Trustee for
John Tuppela and GROVER C. WINN as
Guardian of the Person of John Tuppela,
Defendants.

DIRECT INTERROGATORIES PROPOUNDED
TO LAURI MOILANEN. [177]

Q. 1. Please state your name, residence and occupation.

A. 1. My name is Lauri Moilanen. I am living at 18 Saari Parkway, Fitchburg, Mass. My occupation is that of editor.

Q. 2. State where you were located on or about March 11, 1918.

A. 2. I was in Astoria, Oregon.

Q. 3. Please state whether or not you were acquainted with, or know the defendant John Tuppela.

A. 3. Yes, I have seen him two or three times.

Q. 4. Please state whether or not you saw said John Tuppela at Astoria, Oregon, on or about March 11, 1918.

A. 4. Yes.

(Deposition of Lauri Moilanen.)

Q. 5. Please state whether or not on or about said March 11, 1918, you were called upon to act as a witness or interpreter in any manner pertaining to a written instrument wherein said Tuppela and the above-named plaintiff, Enoch E. Mathison, were interested.

A. 5. Yes, I was.

Q. 6. In connection with the last preceding interrogatory, the notary public will hand you a written instrument and you are asked to state whether or not that is the written instrument to which you refer, and if so, please attach hereto and make it a part of your deposition.

A. 6. Yes, that seems to be the same document. I have done it.

Q. 7. Referring to said instrument, please state whether or not you were one of the witnesses thereto, and, if so, whether or not your signature appears thereon.

A. 7. Yes, I was, and my signature appears thereon.

Q. 8. In connection with said instrument and your acting as witness thereto, you are requested to state how you happened to act as such witness. [178]

A. 8. All I recall about that is that I was in the office of Mr. Mathison on that day, some time in the afternoon as I recall it, and Mr. Mathison asked me to be a witness to a certain agreement that he had made with a person who was introduced to me as John Tuppela.

Q. 9. In connection with the execution of said in-

(Deposition of Lauri Moilanen.)

strument, please state whether or not the same was signed by John Tuppela and Enoch E. Mathison in your presence.

A. 9. Yes.

Q. 10. In connection with the execution of said instrument, you are asked to state the persons present at the time that the instrument was so signed and all the circumstances attendant therewith.

A. 10. I was present, Mr. Tuppela was present, Mr. Mathison was present in the same room. I do not remember exactly whether Mr. Barrett was in the same room or in an adjoining room just at the moment when Mr. Tuppela signed the instrument. There was some discussion about the misfortunes that had befallen Mr. Tuppela in Alaska. As I remember it, he explained that he had located valuable mining properties in Alaska as a prospector and certain interests had conspired to take those properties away from him; that he had been hounded in his cabin during nights and that finally he was arrested as an insane; that he was held in some asylum in Alaska for a while and then taken to an insane asylum at Salem, Oregon; that one Mr. August Nikula secured his release from the asylum at Salem; that Mr. Tuppela had learned that his properties or his interests in the mining properties, had been passed upon at court [179] in Alaska and sold for a trifling sum; and that it was his intention and desire to get the properties back; that he had little or no money at the time he was released from the asylum at Salem, Oregon.

(Deposition of Lauri Moilanen.)

Q. 11. In connection with the execution of said instrument, you are requested to state, as near as you recollect, the conversation, if any, had between said John Tuppela and Enoch E. Mathison at that time, and in what, if any, language said conversation was had.

A. 11. Mr. Tuppela's part of the conversation is stated substantially in the preceding answer. The conversation was carried on in the Finnish language.

Q. 12. Please state whether or not you speak, read and write the Finnish language, and, if so, over what period of time you have been able to speak, read and write it.

Q. 12. The Finnish language is my native language and I read and write it.

Q. 13. Please state whether or not you spoke, read and wrote the Finnish language at the time of the execution of said contract on or about March 11, 1918.

A. 13. Yes, I did.

Q. 14. Please state, if you know, whether or not said John Tuppela understood the Finnish and English language on or about March 11, 1918, and at the time of the execution of the said contract.

A. 14. Mr. Tuppela spoke Finnish, but I do not remember having received any information regarding his ability to read or understand English.

Q. 15. Please state whether or not said contract was explained to said John Tuppela before he placed his signature thereon [180] and, if so, in what language or languages it was explained to

(Deposition of Lauri Moilanen.)

him, and by whom.

A. 15. As I remember it, I explained the contract to him in the Finnish language.

Q. 16. Please state what, if anything, said John Tuppela did or said at said time to indicate that he did or did not understand the terms and conditions of said contract. A. 16. He did nothing.

Q. 17. Please state everything that you now recall that was done at said time to explain the terms or conditions of said contract at the time of the execution thereof, to said John Tuppela.

A. 17. As I remember it, I read, or interpreted the document in Finnish.

Q. 18. Please state what, if anything, was done by you, E. E. Mathison, J. J. Barrett, or anyone else to conceal from said Tuppela the terms of said contract, or their true meaning.

A. 18. I do not remember anything of such nature having taken place.

Q. 19. Are you personally acquainted with Enoch E. Mathison, the other party to said written instrument? A. 19. Yes, I know him.

Q. 20. How long have you known him?

A. 20. Since 1916.

Q. 21. Please state what, if anything, that said John Tuppela either did or said at the time of the execution of the writing witnessed by you, which would tend to show that said John Tuppela was satisfied or dissatisfied with the terms of said written instrument. [181]

A. 21. I do not recall his having said anything

(Deposition of Lauri Moilanen.)

that he is either satisfied or dissatisfied with the document or instrument.

Cross-interrogatories.

Q. 1. If, in answer to the direct interrogatory, you have stated that you explained the instrument referred to to John Tuppela in the Finnish language, now state, if you fully explained to him that the said instrument made no provision for the payment of any expenses of the contemplated suit by Enoch E. Mathison.

Mr. MANNIX.—I object to cross-interrogatory No. 1 and the question contained therein for the reason that it is irrelevant and immaterial; not bearing on any issue raised by the pleadings and not proper cross-examination.

Mr. COBB.—Well, the objection is not well taken, and in the next place, it is made too late. There was no objection made at the time. Mr. Mannix appeared.

The COURT.—Was any objection made at the cross-examination?

Mr. COBB.—Until they got them down there at Astoria. What we claim is a vital omission that renders the whole thing nugatory, unless it was cured by actual performance; and it wasn't.

Mr. ROBERTSON.—Well, I am not able to say.

The COURT.—The objection will be overruled. He may answer.

A. 1. I explained all there was to the document, no more.

(Deposition of Lauri Moilanen.)

Q. 2. Is it not a fact that Enoch E. Mathison, as well as yourself, knew at that time that John Tupela had been recently discharged from an asylum for the insane and was utterly penniless? [182]

By JOSEPH MANNIX, of Attorneys for Plaintiff.—I object to cross-interrogatory No. 2 and the question contained therein for the reason that it is irrelevant and immaterial, not bearing on any issue raised by the pleadings and not proper cross-examination.

Mr. COBB.—Well, that's in the same condition as the others. It is not well taken.

Mr. MANNIX.—Does the Court wish me to repeat—

The COURT.—I'll overrule the objection.

A. 2. Yes.

Q. 3. In the conversation to which you have testified at the time of the execution of said instrument, what was said in regard to who was to advance the necessary moneys to bring and prosecute the suit for Tuppela which was then contemplated.

By JOSEPH MANNIX, of Attorneys for Plaintiff.—I object to cross-interrogatory No. 3 and the question contained therein for the reason that it is irrelevant and immaterial, not bearing on any issue raised by the pleadings and not proper cross-examination.

Mr. COBB.—Just asked for a continuation of the conversation—the same kind of situation. Objection is not well taken.

The COURT.—Well, objection overruled.

(Deposition of Lauri Moilanen.)

(Question three repeated.)

A. 3. I understood that Mr. Mathison was to take care of the suit.

Q. 4. Have you discussed your answer to the direct and cross-interrogatories with anyone since the questions were propounded to you? If so, with who? [183]

A. 4. No, except that Mr. Mathison wrote me inquiring whether I remember that I had been a witness to the instrument in question, and I answered him, yes.

LAURI MOILANEN.

Subscribed and sworn to before me this 14th day of June, 1922.

JOHN G. AMALA,

Justice of the Peace, State of Massachusetts, County of Worcester, Residing at Fitchburg.

State of Massachusetts,
County of Worcester,—ss.

CERTIFICATE.

I, John G. Amala, Justice of the Peace in and for the State of Massachusetts, County of Worcester, residing in Fitchburg, do hereby certify that the witness Lauri Moilanen named in the foregoing deposition, before testifying in said cause, was by me sworn to tell the truth, the whole truth and nothing but the truth in said cause; that said deposition was taken pursuant to the commission issued out of the District Court for the District of Alaska,

(Deposition of Lauri Moilanen.)

Division No. 1, at Juneau, in that certain action entitled "No. 2115—A, Enoch E. Mathison, plaintiff, versus John Tuppela et al., defendants," which said commission is hereunto attached and is herewith returned; that said deposition was taken by me in the city and State aforesaid on the 14th day of June, 1922, between the hours of ten o'clock A. M. and four o'clock P. M. thereof, and that the interrogatories hereunto attached were then and there propounded by me to said witness who thereupon made answer thereto which said answers were thereupon reduced to writing by Aina M. Pera, a qualified and disinterested person, and when completed, said answers were carefully read by said witness after they had been so reduced to writing and thereupon, [184] after they had been by him corrected, were by him subscribed in my presence.

Witness my hand and official seal this 14th day of June, 1922.

JOHN G. AMALA,

Justice of the Peace for the State of Massachusetts,
County of Worcester, Residing in Fitchburg.

My commission expires Nov. 7, 1924.

Mr. ROBERTSON.—I want that deposition in evidence, and reserve an exception to those objections overruled on cross-examination.

The COURT.—You may reserve your exceptions to the overruling of the objections.

Mr. ROBERTSON.—I will now read the deposition of J. J. BARRETT:

Deposition of J. J. Barrett, for Plaintiff.

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA, J. H. COBB as Trustee for
John Tuppela, and GROVER C. WINN, as
Guardian of the Person of John Tuppela,
Defendants.

DEPOSITION OF J. J. BARRETT.

State of Oregon,
County of Clatsop,—ss.

BE IT REMEMBERED That on this fifth day of June, 1922, before me, Clerk of the Circuit Court in and for the State of Oregon, County of Clatsop, personally appeared, in pursuance to the annexed [185] commission, J. J. Barrett, a witness on behalf of the plaintiff Enoch E. Mathison in the above-entitled action, and that thereupon, after said witness was by me first duly sworn on oath to tell the truth, the whole truth and nothing but the truth, I did propound to said witness the interrogatories hereunto attached and thereupon the said witness made answer to said interrogatories as hereinafter set forth, to wit:

(Deposition of J. J. Barrett.)

Direct Interrogatories Propounded to J. J.
BARRETT.

Q. 1. Please state your name, residence and occupation, and for how long engaged therein.

A. 1. J. J. Barrett, Astoria, Oregon, practicing attorney. Have practiced in Oregon since June, 1910.

Q. 2. State what, if any, official position you held in Clatsop County, State of Oregon, on or about March 11, 1918?

A. 2. None, except Notary Public for the State of Oregon.

Q. 3. State whether or not you are acquainted with or know the above-named defendant, John Tuppela?

A. 3. Yes; I am acquainted with the defendant John Tuppela.

Q. 4. State whether or not you saw John Tuppela in Astoria, Oregon on or about March 11, 1918?

A. 4. I did.

Q. 5. State whether or not on or about March 11, 1918, you had any transaction with said John Tuppela relative to taking his acknowledgment to a written instrument in which Enoch E. Mathison was one of the parties, and, if so, when and where?

A. 5. I did, on March 11, 1918, at Astoria, Clatsop County, State of Oregon, take the acknowledgment of said John Tuppela and Enoch E. Mathison, to such an instrument.

Q. 6. Referring to your answer to the preceding

(Deposition of J. J. Barrett.)

interrogatory, you are requested to attach hereto a copy of said instrument and to mark it "Exhibit 1" and make it a part hereof, and also identify said original written instrument by making "Plaintiff's Exhibit #1 for Identification," signing your name under it, and then have the notary public sign under that and affix his official seal opposite his name, so that the original may be identified when it is brought into court. Please state whether you have done so?

A. 6. I have done so. [186]

Q. 7. Referring to said written instrument, you are requested to state whether or not you were one of the witnesses to the signature of the parties thereof, and, if so, whether your signature is on said instrument as one of said witnesses.

A. 7. I was, and my signature is on said instrument as one of said witnesses.

Q. 8. In connection with said instrument, you are also requested to state what, if any, official function you performed in connection with the execution of said instrument.

A. 8. As notary public in and for the State of Oregon, residing in Clatsop County, Oregon.

Q. 9. In connection with said instrument, please state, if you know, who, if anybody, signed said instrument, and who was present when it was signed.

A. 9. John Tuppela signed said instrument as party of the first part thereto, and Enoch E. Mathison signed said instrument as second party thereto, and Lauri Moilanen signed said instrument with

(Deposition of J. J. Barrett.)

myself as attesting witnesses, and all of said signatures were made in my presence, and such signing parties were all the persons present at the time of the execution of said instrument.

Q. 10. In connection with said instrument, please state what, if any, acknowledgment was made by anyone of the execution of said instrument, and, if acknowledged, before whom and by whom?

A. 10. Said acknowledgment was acknowledged before me as a notary public of the State of Oregon by said John Tuppela and Enoch E. Mathison, and that I thereupon attached my certificate of acknowledgment and affixed my seal thereto, and signed such certificate as a notary public at the bottom of Plaintiff's Exhibit 1, for Identification.

Q. 11. In connection with the execution of said instrument, please state to the best of your recollection the persons present and the circumstances attending the execution of said instrument.

A. 11. The persons present were John Tuppela, Enoch E. Mathison, Lauri Moilanen and myself. As is my invariable rule when taking an acknowledgment of that kind, I asked the said parties, John Tuppela and Enoch E. Mathison, who signed the same, if they knew and understood the contents of said Plaintiff's Exhibit 1, for identification, and whether they executed the same freely and voluntarily and for the uses and purposes therein mentioned and received an answer from each in the affirmative.

Q. 12. Please state what, if anything, was done at

(Deposition of J. J. Barrett.)

the time of the execution of said instrument relative to explaining the contents thereof to said Tuppela? [187]

A. 12. The said John Tuppela had said plaintiff's exhibit 1 for identification, interpreted to him in the Finnish language by said Lauri Moilanen, according to my understanding. While I know very little of the Finnish language, I knew enough at that time to know that said Lauri Moilanen was speaking to Tuppela in the Finnish language, with said plaintiff's exhibit 1, for identification, in his hands, and discussing the contents thereof with said John Tuppela, apparently.

Q. 13. Please state whether or not at the time of the execution of said instrument any person acted as interpreter to or for said John Tuppela, and, if so, what, if anything, was done by said interpreter in the way of interpreting said instrument to said Tuppela in any language other than the English language?

A. 13. I have just stated, Lauri Moilanen acted as interpreter for said Tuppela, and said Lauri Moilanen addressing said Tuppela in the Finnish language, apparently interpreting and explaining to said Tuppela the plaintiff's exhibit 1 for identification, a true copy of which I have attached to this deposition and marked exhibit 1.

Q. 14. If you have stated that said instrument was interpreted in some language other than the English language to said John Tuppela, please state who acted as such interpreter, and into what lan-

(Deposition of J. J. Barrett.)

guage, if you know, he interpreted said instrument to said John Tuppela?

A. 14. Lauri Moilanen acted as interpreter, as stated above, using the Finnish language.

Q. 15. Please state what, if anything, said John Tuppela, did at the time of the execution of said instrument to indicate that he did or did not understand said instrument; describe fully the manner in which he so indicated or expressed his understanding or lack of understanding of the instrument?

A. 15. I asked him the direct question whether he understood the contents of the document and he seemed to be not entirely sure of his ground, and looked towards Lauri Moilanen, who addressed said Tuppela in the Finnish language, apparently explaining the contents, and I asked said Moilanen whether said Tuppela understood the contents of Plaintiff's Exhibit 1, for Identification, and whether he acknowledged the same freely and voluntarily and for the uses and purposes therein mentioned, and said Moilanen answered in the affirmative for said Tuppela. Said Tuppela appeared to be satisfied with the document.

Q. 16. Are you acquainted with the above-named plaintiff Enoch E. Mathison? A. 16. I am.

Q. 17. State whether or not said Enoch E. Mathison is one of the parties to said instrument above referred to, and if so, whether or not he signed and acknowledged it? [188]

A 17. He is one of the parties, and did sign and acknowledge said instrument.

(Deposition of J. J. Barrett.)

Q. 18. Please state, if you know, where said Mathison resides, and what his occupation or business is?

A. 18. He resides at Astoria, Clatsop County, State of Oregon, and he is a practicing attorney.

Q. 19. State, if you know, how long, if at all, said Mathison has resided in Astoria, Oregon?

A. 19. To my knowledge, six years, two and a half months.

Q. 20. State, if you know, the length of time, if at all, said Mathison has practiced law in said city.

A. 20. All during the years of my said acquaintance with him.

Q. 21. At the time of the execution of said contract between Enoch E. Mathison and John Tuppela, where were your offices located with reference to the law offices of Enoch E. Mathison?

A. 21. Enoch E. Mathison maintained an office adjoining mine and we had a common reception-room.

Q. 22. State what, if any, occasion you had—

Mr. COBB.—(Interrupting.) Wait a minute, I object to that. They have elected now—that was competent under the first cause of action, but they have elected to stand on the second, and that testimony, I take it, for services that he performed, doesn't include any issue now in the case. And also to the following questions, as it is repetition, and I shall object to questions No. 22 and the answer to it; No. 23, 24—no, not 24—Nos. 22, 23, 27, 28, 29, 30. That testimony might be admissible as to the

(Deposition of J. J. Barrett.)

value of services, but in this kind of case it is not admissible. It is irrelevant and immaterial.

The COURT.—That is a very questionable proposition. The courts are divided on that. Of course, this thing is simply *quantum meruit*.

Mr. COBB.—But this other testimony is not admissible. [189]

The COURT.—Well, the courts contend it is *quantum meruit*.

Mr. COBB.—How is that?

The COURT.—That the amount of damages for services performed, other courts hold that is based, the measure of damages is based upon the contract, less such services as he would have performed if the contract wasn't invalidated by the other party, to carry out the contract and such expenses, if he has performed any services under the contract, that will have to be taken into consideration as part of the damages, because it resolves itself practically into a question for services he has performed. That is, according to some courts. Now, it is a close question and I am inclined to overrule your objection at the present time.

Mr. COBB.—Well, I note an exception. I don't think it will be material.

(Reading of deposition by Mr. Robertson resumed.)

Q. 22. State what, if any, occasion you had to know the nature and character of the service performed by Enoch E. Mathison in connection with

(Deposition of J. J. Barrett.)

and in carrying out the terms of the instrument in question?

A. 22. Enoch E. Mathison discussed with me at different times the services he was performing for said Tuppela, and I know of my own knowledge that said Tuppela called at his office a large number of times during the period between March 1, 1918, to along the latter part of the summer or about September, 1918.

Q. 23. State, if you know, what, if any, work and services said Enoch E. Mathison performed pursuant to the terms of the contract in question and over what, if any, period of time said services extended?

A. 23. In answer to this question I have stated as fully as I could give it in my answer to the question immediately preceding this one, except that I did observe Enoch E. Mathison examining the decisions and looking up the law involved in the matter covered by said plaintiff's exhibit 1.

Q. 24. Please state what, if anything, was done in connection [190] with the execution of said contract, *with* by said Mathison or any other party to conceal or hide from said Tuppela any terms or conditions of said written instrument above referred to, or the true meaning thereof?

A. 24. Nothing to my knowledge was done whatsoever, either by said Mathison or any other party to conceal or hide from said Tuppela any terms or conditions of said written instrument above referred to, or the true meaning thereof.

Q. 25. State whether or not you are an attorney,

(Deposition of J. J. Barrett.)

and, if so, how long have you been an attorney?

A. 25. I am an attorney and was admitted to the bar in the State of Virginia in November, 1909, and have practiced in the State of Oregon since June, 1910.

Q. 26. State the date of your admission to the bar, and how long have you practiced at Astoria, Oregon?

A. 26. I have answered this question in the preceding question, except that I might say that I have practiced in the City of Astoria, State of Oregon, eight years and two and a half months.

Mr. COBB.—Now, I object to 27 and 28, asking him there as to his reputation for truth and veracity.

The COURT.—I'll hear from the other side on that proposition.

Mr. ROBERTSON.—We won't offer those two questions—27 and 28.

Mr. MANNIX.—We withdraw those questions.

(Reading of deposition resumed by Mr. ROBERTSON.)

Q. 29. Do you know the reputation of said Enoch E. Mathison in the City of Astoria, as to his ability and standing in the legal profession?

Mr. COBB.—I object to that.

The COURT.—I will overrule the objection to that.

Mr. COBB.—Note an exception.

A. 29. Yes.

Q. 30. If so, state what that reputation is.

(Deposition of J. J. Barrett.)

A. 30. Good.

Mr. COBB.—My objection, with, of course, the exception, goes to the three. [191]

The COURT.—To the three; yes.

A. 30. Good.

Q. 31. Are you and John J. Barrett described in the commission to take your deposition one and the same person.

A. 31. I am the same person as John J. Barrett referred to in the said commission.

Cross-interrogatories.

Q. 1. If, in answer to direct interrogatory, you have stated that the instrument referred to was explained to John Tuppela in some language other than English, state whether you understood that language or not?

A. 1. I understood it enough to know when a person was using the Finnish language.

Q. 2. Did you know of your own knowledge that the person assuming to explain said instrument to Tuppela did correctly explain it?

A. 2. I knew Mr. Moilanen, and trusted him to properly interpret it, and was satisfied that he did so.

Q. 3. Is it not a fact known to Enoch E. Mathison at the time said instrument was executed that John Tuppela had been recently discharged from asylum for the insane and was utterly penniless?

By JOSEPH MANNIX, of Attorneys for Plaintiff.—I object to this question No. 3 because it calls for evidence which is incompetent, irrelevant and

(Deposition of J. J. Barrett.)

immaterial; because it is hearsay, because it is not proper cross-examination; and not bearing on any issue raised by the pleadings in this case.

The COURT.—I'll hear from you on that.

Mr. COBB.—I don't care anything about it. He says he doesn't know.

The COURT.—Objection sustained.

A. 3. I don't know.

Q. 4. If, in response to direct interrogatory No. 15, you stated that Tuppela indicated or expressed his understanding of the instrument he was executing, now state whether or not you know that Tuppela did understand it as a matter of fact. [192]

A. 4. Of course, I do not know absolutely that Tuppela did understand it. While he could speak the English language fairly well, he seemed to want to be sure of his ground to the extent that he preferred an interpreter.

Q. 5. If, in answer to direct interrogatories, you have stated that you know the reputation of Enoch E. Mathison as to ability and standing in the legal profession, state whether or not, in all your acquaintance with him you have known him to earn as much as \$300,000 in any one year? If you have known him to ever earn and receive \$150,000 for six months' work?

By JOSEPH MANNIX, of attorneys for Plaintiff.—I object to this question No. 5 because it calls for evidence which is incompetent, irrelevant and immaterial; because it is not proper cross-examina-

(Deposition of J. J. Barrett.)

tion, and not bearing on any issue raised by the pleadings in this case.

Mr. ROBERTSON.—That— The answer to that question is, “I don’t know.”

The COURT.—You waive your objection.

Mr. MANNIX.—We waive it. He answered it that he doesn’t know.

Q. 6. Did Enoch E. Mathison ever bring the suit for John Tuppela under the contract contained in the instrument to which you have testified?

A. 6 I do not know.

Q. 7. Did he ever come to Alaska for the purpose of carrying out said contract?

A. 7. I do not know.

J. J. BARRETT.

Subscribed and sworn to before me this fifth day of June, 1922.

J. C. CLINTON,

Clerk of Circuit Court, State of Oregon, for Clatsop County.

State of Oregon,
County of Clatsop,—ss.

I, J. C. Clinton, Clerk of the Circuit Court of the State of Oregon for the County of Clatsop, residing at Astoria, do hereby certify that the above-described deposition was taken by [193] me personally at my office in the City of Astoria, in the County of Clatsop, State of Oregon, on the 5th day of June, 1922, between the hours of 2:30 P. M. and

3:30 P. M. on said date, pursuant to the directions to me made in the attached commission from the Honorable Thomas M. Reed, Judge of the District Court for the District of Alaska, Division Number One at Juneau, in that certain action entitled No. 2115—A, Enoch E. Mathison, plaintiff, vs. John Tup-pela, et al., defendants; that all of said interrogatories and cross-interrogatories attached hereto were addressed orally to the witness J. J. Barrett, and the answers of said witness were taken down in writing in my presence and at my direction by a stenographer named Pearl Gimre, a party disinterested in said cause; that subsequently said interrogatories and cross-interrogatories, and the answers thereto as given by said witness, were typewritten out by said Pearl Gimre; thereupon the witness J. J. Barrett carefully read all of said interrogatories and cross-interrogatories and made such corrections as the witness saw proper; and thereupon the witness being satisfied with the foregoing interrogatories, cross-interrogatories and his answers thereto, said witness J. J. Barrett in my presence signed the same in the manner and form as the same appear attached hereto. That said J. J. Barrett, witness herein, before examination by me herein, was by me sworn to testify to the truth, the whole truth and nothing but the truth, relative to said cause; and that the foregoing proceedings were all had in my presence at my direction, under my supervision and pursuant to the commands to me addressed in the attached commission.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of my office, this fifth day of June, 1922.

[Seal]

J. C. CLINTON,
Clerk of Circuit Court of State of Oregon, for Clatsop County.

Mr. ROBERTSON.—I would like to offer the trust agreement in evidence and have the clerk make a certified copy of it and return it to Mr. Cobb.

Mr. COBB.—I object to it as irrelevant and immaterial.

Mr. ROBERTSON.—You plead it.

The COURT.—It may be received for identification and a copy made.

Mr. ROBERTSON.—At this time I offer the original trust agreement, with the right to substitute a certified copy, and return the original to Mr. Cobb. [194]

The COURT.—Subject to your objection as to its relevancy?

Mr. COBB.—Yes, sir.

The COURT.—Well, it may be admitted.

(Whereupon said document was received in evidence and marked Plaintiff's Exhibit No. 16.)

Adjourned until Friday, November 10, 1922, at 10 o'clock, A. M.

Friday, November 10, 1922.

Court met pursuant to adjournment at ten o'clock.

Mr. ROBERTSON.—Will you stipulate, Mr. Cobb, that the suit of Tuppela *versus* the Chichagoff Mining Company, No. 1841—A, was instituted on May 10, 1919?

(Testimony of James Wickersham.)

Mr. COBB.—May 10th or 8th; I don't know.

Mr. ROBERTSON.—Tenth is the date.

Mr. COBB.—Yes; that may be admitted as a fact in the case.

Mr. ROBERTSON.—Plaintiff rests. [195]

And thereupon the defendants, to maintain the issues on their part, introduced the following evidence, to wit:

Testimony of James Wickersham, for Defendants.

JAMES WICKERSHAM, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By J. H. COBB.)

Q. State your name?

A. James Wickersham.

Q. Where do you reside?

A. At present in Juneau.

Q. How long have you resided in Alaska?

A. Something over twenty-two years.

Q. State what official position you held up here?

A. Well, for eight years I was District Judge.

Q. For how long?

A. For about eight years.

Q. And you were delegate to Congress for twelve years?

A. Some twelve years, delegate to Congress.

Q. You are a practicing attorney? A. Yes.

(Testimony of James Wickersham.)

Q. And had been an attorney for a good many years before you went on the bench? A. Yes.

Q. Judge, assuming that a contract of employment was entered into between an attorney and client in which the attorney undertakes, or contracts, to bring suit to recover mining claims in the possession of a third party claiming them, and who may be spending money in developing the property; assuming further that this claim to the property is all in [196] the world that the client has, how soon, in the exercise of ordinary skill, care and dispatch, should that suit be started?

Mr. ROBERTSON.—Now, wait a minute. We object to that question, if the Court please; first, that it is not founded on evidence that has yet been produced in this case—at least two facts that have been proved. It is a hypothetical question upon which there must be evidence in the case, first, upon which the question should be laid; further, that the question is incompetent, irrelevant and immaterial and that there is no issue in the case which would warrant calling for the conclusion of the witness as to within what time any action should be started under such proceedings, or such contract, and, of course, it further invades the province of the jury, if that question goes to the jury, as to whether or not Mr. Mathison was, or was not, negligent in instituting suit. It is a question for the jury to decide, not a question for witnesses on the witness stand to decide.

The COURT.—In every contract of employment

(Testimony of James Wickersham.)

between an attorney and client, there is an applied condition in the contract that the attorney will proceed with the matters entrusted to his care with reasonable diligence, dispatch and skill. Now, if that point is made an issue in this case, that the plaintiff did not proceed with his contract with reasonable dispatch—as to that point, I will suggest that the question be read again to see whether all the hypothetical matters in the question, pertinent to this case, are stated in the hypothetical question.

(Question repeated by the reporter.) [197]

Mr. MANNIX.—If the Court please, I wish to call attention to one hypothetical statement which is not warranted by the evidence that has been produced in this case, and that is that this particular client was without any money in the world, because there is testimony that at that time he had something like \$300, and for the further reason that his hypothetical question does not take into consideration other evidence as to conditions which existed at the time of the entering into of the contract between the plaintiff and the defendant in this case, and the conditions that obtained subsequent to the entering into of the contract. In other words the hypothetical question does not comprehend all the conditions necessary in this case before this witness could give an answer on a matter that should go to the jury.

Mr. COBB.—The testimony of the plaintiff—one of the witnesses here, or the plaintiff himself testified that he understood Tuppela was to get

(Testimony of James Wickersham.)

\$300 that some fisherman had owed him when he could make that money fishing, or something to that effect, and he understood that he got that or would get it in the August following. Another witness for the plaintiff, by deposition, testified that at the time that the contract was made, the plaintiff knew that John Tuppela was absolutely penniless. That is one of the questions objected to. Now, as to the conditions obtaining, I stated them all. The condition of the parties has nothing to do with it.

The COURT.—I'll overrule the objection. You may answer.

Mr. COBB.—Of course, if they have anything in mind, they can wait until the cross-examination. [198]

Mr. ROBERTSON.—We feel that also the question should embody the proposition that there is evidence in the case to show the client was coming to Alaska to obtain and furnish—

The COURT.—(Interrupting.) Yes, I understand that, but I think that can be brought out on cross-examination. You may answer.

A. If the parties were in the Territory and in the neighborhood of where the suit is to be brought, I think a suit like that ought to be brought within thirty days.

Q. Assuming that they were in the state of Oregon at the time the contract was made, contemplating a suit in Alaska, in the exercise of ordinary skill and dispatch, how soon should it be brought

(Testimony of James Wickersham.)

then? A. Within ninety days.

Q. Is there any particular reason why there should be more dispatch, more haste, in filing a suit of that kind than an ordinary suit?

Mr. ROBERTSON.—Now, if the Court please, we object to that as calling for a conclusion of the witness purely. Judge Wickersham may give one opinion, I might think different, you might think another way and the jury think another.

The COURT.—Well, this witness is put on as an expert.

(Question repeated by the reporter.)

A. Yes; indeed.

Mr. ROBERTSON.—Exception.

The COURT.—Objection overruled.

Q. State what those reasons are?

Mr. ROBERTSON.—We make the same objection to that, if the Court please. [199]

A. Well, the reasons are that mining property is a peculiar sort of property. A mining claim that may be without value to-day, may to-morrow, with a little work on it, become very valuable, and the rule is that the parties who intend to bring suit to recover mining property of that nature should do so promptly, and especially when the other party is in possession and at work.

Mr. ROBERTSON.—We move to strike out that last. There is nothing to show that there were other parties in possession and at work.

The COURT.—Motion denied.

(Testimony of James Wickersham.)

Q. What is likely to result from a failure to act promptly in such a case?

Mr. ROBERTSON.—I make the same objection to that question—calling for the conclusion of the witness, simply. No man can answer that.

The COURT.—Objection overruled.

A. There is always a chance, at least, that the parties who are in possession will strike valuable property and then the rule of laches, the rule of negligence of stale demand and so forth, comes in in equity and is liable to give the man's client a great deal of trouble and probably, or possibly at least, bar him from recovery.

Q. Simply upon the ground of delay?

A. Simply upon the ground of delay.

Q. Do you know of a case in which that rule has been applied to even less than three months' delay?

Mr. ROBERTSON.—We make the same objection to that, if the Court please.

The COURT.—Objection sustained. [200]

Cross-examination.

(By Mr. ROBERTSON.)

Q. Judge, if the parties are in the Territory, you think it would be gross negligence if this suit wasn't instituted within thirty days—is that what I understood you to say?

A. No; I don't say that. I said that is a reasonable time within which to do it and that it ought to be done within thirty days.

Q. Ought to be done within thirty days?

(Testimony of James Wickersham.)

A. Yes; ordinarily.

Q. Now, there may be circumstances where even a great deal more time than thirty days could elapse and you wouldn't feel that the attorney had committed negligence, would you?

A. Every case stands upon the facts in that case; yes.

Mr. ROBERTSON.—That's all.

Mr. COBB.—That's all.

Testimony of John Rustgard, for Defendants.

JOHN RUSTGARD, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. John Rustgard.

Q. You reside in Juneau? A. I do.

Q. At present Attorney General of the Territory?

A. Yes, sir.

Q. And practicing law, of course? A. Yes, sir.

Q. How long, Mr. Rustgard, have you practiced law in Alaska? [201]

A. Well, I came to Alaska a little better than twenty-two years ago, but I didn't start practicing law until I had been here two or three years.

Q. How is that?

A. I didn't commence practicing law, to speak of,

(Testimony of John Rustgard.)

until I had been here three years or so. Oh, I have practiced, in all, twenty years in the Territory.

Q. And you were mining part of the time at Nome? A. Yes.

Q. Practiced law at Nome and also in this division? A. Yes, sir.

Q. You have had mining cases, many of them?

A. Yes; I have had some.

Q. Mr. Rustgard, assuming a contract made between attorney and client, in which the attorney contracts to bring suit to recover mining claims in the possession of a third party who may be developing them, how soon, in the exercise of reasonable skill, care and dispatch, should that suit be instituted?

Mr. ROBERTSON.—Now, we object to that as incompetent, irrelevant and immaterial; no proper foundation laid; not being properly laid upon the facts in this case so far adduced.

The COURT.—Objection overruled. He may answer.

A. As soon as practically possible.

Q. Is there any reason known to you, or known to attorneys generally, general practice, why there should be as little delay as reasonably possible in bringing that kind of a suit?

Mr. ROBERTSON.—We make the same objection. [202]

The COURT.—I'll sustain the objection to that question, if I understand it.

(Testimony of John Rustgard.)

Mr. COBB.—I didn't hear the objection.

The COURT.—The objection was that it was incompetent, irrelevant and immaterial.

Mr. COBB.—I think, perhaps, considering the form of the question, the Court is right. It wasn't exactly as I wanted to phrase it.

Q. Is there any reason known to you—I'll limit it to that—is there any reason why that sort of suit should be brought as early as is reasonably possible?

Mr. ROBERTSON.—Now, I object to that as incompetent, irrelevant and immaterial. No proper foundation laid at this time for the witness' testifying to it.

Mr. MANNIX.—And for the further reason that there is nothing to show what kind or particular suit is meant—no facts at all brought to the attention of this witness which would bring to his mind the kind of suit.

Mr. COBB.—I'm referring to the lawsuit—

The COURT.—(Interrupting.) 'Objection overruled as to the nature of the action and the character of the property.

Mr. COBB.—I'm referring, of course, to the sort of suit referred to in the preceding interrogatory.

A. Well, if I understand it, that first interrogatory referred to a suit for an interest in property which was in process of development.

Q. Yes.

A. There is a reason, yes, why such suits should

(Testimony of John Rustgard.)

be brought with all possible speed, and it is this: that the other party, the defendant, who is presumably developing the property, is entitled to have the title settled before he [203] expends money on it, and the plaintiff should be required to show his hand before it is ascertained, by the money spent by the other fellow, whether or not the property is worth fighting for.

Q. And if there was a delay under such circumstances, what is likely to happen?

Mr. ROBERTSON.—We object to that as irrelevant, immaterial and incompetent and calling for a conclusion of the witness.

The COURT.—Objection overruled. He may answer, if he knows what is likely to happen.

A. The word “likely,” that gives a phase to that question which makes it difficult to answer.

Q. What may possibly happen? What kind of defense?

Mr. ROBERTSON.—The same objection to that. They’re leading an expert witness.

The COURT.—Objection sustained, because the question doesn’t refer to any contingency.

Mr. COBB.—How is that?

The COURT.—The objection is sustained because the question doesn’t refer to any contingency or as to what might happen, what might cause—

Q. Assuming a controversy over mining claims and an unreasonable delay in the plaintiff’s filing suit and the property in the possession of the third party, what possible injury, culpable injury, might

(Testimony of John Rustgard.)

result to the client from the delay in instituting suit?

A. We object to that as incompetent, irrelevant and immaterial; no proper foundation laid in this case for such a hypothetical question.

The COURT.—You may answer. Objection overruled. [204]

A. Why, if there is a delay in bringing such suit, the money spent by the man in possession, the defendant, upon the development of the property, would accrue to the interests of the plaintiff, if the defendant lost the property. In other words, the defendant would not himself benefit by the development of the property if he lost the suit and the development progressed prior to the commencement of the action and before question of title was raised.

Q. In that sort of situation would the doctrine of laches apply against the plaintiff to bar his right or title?

Mr. ROBERTSON.—We object to that as calling for a conclusion of the witness entirely.

Mr. COBB.—That is what he is being examined on.

Mr. ROBERTSON.—And also very leading.

The COURT.—Objection overruled.

A. Why, yes.

Q. Now, you say that that kind of a suit mentioned in the preceding interrogatory should be brought as soon as possible. What would you say would be a reasonable time in which it should be brought?

Mr. ROBERTSON.—Now, I object to that as too

(Testimony of Henry Roden.)

indefinite.

The COURT.—Objection sustained.

Mr. COBB.—On the ground that it is too indefinite?

The COURT.—Yes; doesn't cover the whole proposition and matters in issue in this case.

Mr. COBB.—Very well. I'll try to put it in such a way as to cover it all.

The COURT.—You have already called his attention to what would be a reasonable time—what would be a reasonable time was the first question.
[205]

Mr. ROBERTSON.—Yes, sir; and he has already answered.

Mr. COBB.—He said as soon as possible.

Mr. ROBERTSON.—As soon as practically possible.

Mr. COBB.—Well, with that answer, I'll just rest.

Testimony of Henry Roden, for Defendants.

HENRY RODEN, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. State your name.

A. Henry Roden.

Q. You are an attorney at law? A. Yes, sir.

(Testimony of Henry Roden.)

Q. How long have you been practicing, Mr. Roden? A. Sixteen years.

Q. In Alaska? A. Yes, sir.

Q. Mr. Roden, assuming that a contract is entered into between a client and an attorney in which the attorney undertakes to bring and prosecute a suit to recover mining claims in the possession of a third party who may be developing them—how soon, in the exercise of ordinary skill, care and dispatch should that suit be instituted?

Mr. MANNIX.—We object to that. Just a minute; we object to this question for the reason that the attorney is assuming a contract in this case which, in the nature of the same, calls for the institution of legal proceedings. This particular contract is such that the plaintiff in this case, in carrying out the terms thereof, could have fully performed the conditions of that contract without ever going into a [206] a court of law. In other words, he could have performed the contract by simply settling the case outside of the courts. Those are facts which are not assumed in the hypothetical question, and a further reason is that this hypothetical question does not cover all the material parts or bits of evidence in this case, bearing upon the carrying out of the terms of the contract by the plaintiff.

Mr. COBB.—The contract does provide, of course, for a fee in the event of settlement. The trouble about this objection that they have made is that there is no proof that any settlement was ever made or any attempt to settle it, so that it left it depend-

(Testimony of Henry Roden.)

ing wholly upon his undertaking to bring suit. Not only didn't they institute suit, but they never settled, never attempted to settle it—no negotiations for a settlement for fourteen months.

The COURT.—Objection overruled.

A. If the property is being developed, I think great dispatch should be practiced and the suit should be brought just as soon as all the circumstances should permit.

Mr. ROBERTSON.—What is the last part of your answer?

A. As soon as the circumstances will permit.

Q. That it should be brought as soon as possible?

A. Yes, sir.

Q. Well, what do you mean by "as soon as possible"—what length of time; that is, that the attorney should have it prepared and get the suit to court?

Mr. ROBERTSON.—Just a minute. I object to that, because there is no evidence here as to what kind of case he is preparing. It may be a little case for the recovery of a small interest in a claim that wouldn't take a week to prepare; [207] and it may be a case of such a nature that it would take six months to prepare. You probably have had such a case and I have worked on that kind of a case myself; so that that kind of question to this witness is absolutely unfounded on any facts in this case.

(Question repeated by the court reporter at request of Court.)

Mr. COBB.—The sort of case referred to in the

(Testimony of Henry Roden.)

preceding interrogatory.

A. Why, not to exceed thirty days.

Q. How is that?

A. Not to exceed thirty days, in my opinion.

Q. What, if any reason exists for the exercise of special dispatch in getting that kind of a suit started?

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial and calling for a conclusion of the witness.

The COURT.—He may answer.

A. The rule that a party must not sleep upon his rights applied with particular force in a case of this kind. In other words, a party must not stand by and watch another man spend his money and his efforts, and then try to secure relief in the courts after that party succeeds and had gambled on the outcome of the development.

Cross-examination.

(By Mr. ROBERTSON.)

Q. If all the parties were in the Territory of Alaska, how many days, do you think such a suit should be brought in?

A. Well, if all the parties weren't in the Territory—

Q. (Interrupting.) No, if all of them are in the Territory.

A. Oh, yes, in the Territory. I think a suit should be brought in not less than thirty days. As a matter of fact, I think a suit should be brought—well,

(Testimony of Henry Roden.)

speaking from my experience, [208] I think it should be brought immediately?

Q. What do you call immediately?

A. Within three or four days.

Q. Within three or four days from what time?

A. From the time that the client puts the facts before his attorney.

Q. From the time that you get all the facts from your client and know exactly how you are going to win your case, isn't that the point?

A. Yes; you would want to know the facts.

Q. You don't institute your suit, Mr. Roden, until you know that you got your facts together upon which you were going to substantiate your case?

A. No; I don't.

Q. And if it should happen to take more than thirty days—if it should happen to take three months in order to get those facts, you would take that time, wouldn't you, under ordinary circumstances?

A. Yes; I would take that time; yes, sir.

Mr. ROBERTSON.—That's all.

Redirect Examination.

(By Mr. COBB.)

Q. Have you ever, in your practice, required three months in which to gather up all the facts, on which to draw your pleadings?

Mr. MANNIX.—We object to that as incompetent, irrelevant and immaterial.

The COURT.—Objection sustained.

(Testimony of Henry Roden.)

Mr. COBB.—It's only in response to the last question they asked. [209]

The COURT.—Yes, I know; but the question is if he had in his practice.

Mr. COBB.—Oh, yes.

Q. Have you known of any instances in which it required three months, in the exercise of ordinary dispatch, to get sufficient facts on which to draw your pleadings?

Mr. MANNIX.—We object to that as incompetent, irrelevant and *matterial*—no bearing on any issue in the case.

Mr. COBB.—That's proper redirect examination—explanatory of the answer.

The COURT.—Yes; objection overruled.

A. No.

Recross-examination.

(By Mr. ROBERTSON.)

Q. You don't mean to say that there aren't such cases?

A. No; I don't mean to say that; no, sir.

Q. Now, as a matter of fact, Mr. Roden, in so simple a case as a case in the Commissioner's court, suing for damages for a breach of contract, in a suit which you recently instituted, as a matter of fact, you had that in your office for a period of at least two or three or four weeks, haven't you. Isn't that correct?

A. That is a fact; yes.

Q. Now, isn't it true that in every attorney's

(Testimony of Henry Roden.)

practice a client may come to him with a case that may take several weeks or several months, no matter how insignificant, or how significant the case may be, before you can finally get down into court, before you can bring a lawsuit?

A. Oh; it might be. I can imagine such circumstances.

Mr. ROBERTSON.—That's all. [210]

Testimony of J. R. Winn, for Defendants.

J. R. WINN, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. COBB.)

Q. Judge, you were the leading counsel in the case of John Tuppela against the Chichagoff Company, were you?

A. Why, you and I were associated together in the case; yes.

Q. At the time that you entered into the contract that is in evidence here already, May 2, 1919, did you know anything about the plaintiff in this case having ever been retained by John Tuppela?

A. The plaintiff is Mr. Mathison?

Q. Yes.

Mr. ROBERTSON.—Oh, we object to that.

The COURT.—Upon what ground?

(Testimony of J. R. Winn.)

Mr. ROBERTSON.—Incompetent, irrelevant and immaterial. We don't see how a negative proposition of that kind can prove their case. It isn't a question of whether or not Judge Winn knew about it. It's a question necessarily whether or not Mr. Tuppela knew about it in any event. He knew it.

Mr. COBB.—The purpose of that question is this: it seemed to me; at least, it was insinuated yesterday that Judge Winn or I took this case and concealed it from Mr. Mathison and failed to notify him of it; that we didn't act in good faith with him. Now, I propose to show that neither of us knew anything about this until the July following, when I discovered this contract among Mr. Tuppela's papers which Mr. Mathison had returned to him when he acquired the case. I think these facts should go to the jury. [211]

Mr. ROBERTSON.—We certainly think this question to Judge Winn is entirely irrelevant and immaterial. Judge Winn is not a party to this case. I don't know of anyone in this case who has so far in any wise impugned Judge Winn's integrity, his reputation or anything else. It is very true that there was something on the witness-stand that Mr. Mathison said with reference to Mr. Cobb's knowledge, but my recollection is that the Court struck that statement out on the motion of Mr. Cobb. Now, then, to call in Judge Winn and attempt to prove a negative proposition by him that he didn't know about this certainly doesn't affect the merits

(Testimony of J. R. Winn.)

of this case, as to whether or not Mr. Mathison is entitled to recover from Mr. Tuppela.

The COURT.—I think I'll sustain the objection. I don't think it is material to the case.

Mr. COBB.—How is that?

The COURT.—I'll sustain the objection.

Mr. COBB.—Well, it isn't very material. I think it was due Judge Winn. I don't see why these gentlemen object to it so much.

We next offer in evidence defendant's plea of laches in the case of John Tuppela against the Chichagoff Mining Company—

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, if the Court please. It has certainly not been pleaded here as a matter of estoppel. It is true that they pleaded in this case laches, but the defense of laches that the Chichagoff Mining Company set up against Tuppela might be entirely different laches than the defendant in this case set up against this plaintiff, and that would be [212] purely offering in evidence a decision—tantamount to offering in evidence a decision of a court; and the Court itself is the judge of the law and instructs the jury on the law. It's not for the jury to ascertain what the law is on the doctrine of laches.

The COURT.—What is the purpose of it?

Mr. COBB.—The purpose is to show that there was—

The COURT.—(Interrupting.) Let me see it.

Mr. COBB.—(Continuing.) —a delay of fourteen

(Testimony of J. R. Winn.)

months from the time that the suit could have been brought until it was brought by other counsel, and that because of that very reason a situation arose in which a plea of laches was successfully interposed in the lower court, and I propose to explain how we got out of that sort of situation and saved the case that was endangered by this man's negligence, just as I wrote him.

Mr. ROBERTSON.—Now, wait, Mr. Cobb. Don't testify there.

Mr. COBB.—How is that?

Mr. ROBERTSON.—Please don't testify unless you are on the witness-stand, unless it is something that is in evidence.

Mr. COBB.—It is in evidence, just as I wrote him. You introduced the letter.

Mr. ROBERTSON.—The plea of laches was already made—

Mr. COBB.—(Interrupting.) I don't care anything about the plea except that I want the fact to go before the jury that this plea was interposed and successfully interposed before the lower court.

Mr. ROBERTSON.—And it was also successfully overthrown in the Circuit Court of Appeals. The Circuit Court of Appeals held that such a plea didn't lie.

Mr. COBB.—No; they didn't hold that. [213]

Mr. ROBERTSON.—They overthrew it.

Mr. COBB.—No, no.

The COURT.—Wait a moment. There is no use of arguing over this. The best way to settle that

(Testimony of J. R. Winn.)

contention is to get the decision itself. But as to the question of whether or not this plea was entered, I think you may introduce the record to show that the plea was introduced; but not the contents of the plea.

Mr. COBB.—Yes, sir.

The COURT.—Objection sustained as to that extent—that you cannot introduce the contents of the plea.

Mr. COBB.—That a plea of laches was entered in that case.

The COURT.—That may be stipulated by counsel.

Mr. ROBERTSON.—Of course, we're reserving our rights to later show our contention as to what the Circuit Court of Appeals did with that plea.

The COURT.—Yes.

Mr. ROBERTSON.—And it is also stipulated that it is subject to the same objections and that Judge Jennings sustained it.

The COURT.—Subject to your objection as to its materiality.

Testimony of J. H. Cobb, for Defendants.

J. H. COBB, one of the defendants herein, called as a witness on behalf of the defendants, having been first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By GROVER C. WINN.)

Q. Just state your name. A. J. H. Cobb.

(Testimony of J. H. Cobb.)

Q. Where do you reside

A. Juneau, Alaska. [214]

Q. How long have you been a resident of Juneau?

A. Twenty-five years next January.

Q. What is your profession or business?

A. Attorney at law.

Q. How long have you been admitted to practice?

A. Since 1884.

Q. Ever since you resided in the Territory?

A. Since I resided in the Territory I have been continuously practicing law.

Q. Are you the same person that is mentioned in a certain contract entered into between Mr. Tuppela and Judge Winn?

A. I am. To bring suit?

Q. Yes; to bring suit?

A. Yes; I was one of the attorneys who signed that contract.

Q. This Plaintiff's Exhibit No. 15, Mr. Cobb, I now hand you and ask you if that is the contract which you entered into? A. That is the contract.

Q. Did you bring suit against the Chichagoff Mining Company, as provided in that contract?

A. I did; I brought No. 1841—A, on the docket of this court, entitled John Tuppela against the Chichagoff Mining Company.

Q. How long have you been acquainted with Mr. Tuppela?

A. I got acquainted with Mr. Tuppela first on the second day of May, 1919, and from that time until he left last fall, I knew him and was inti-

(Testimony of J. H. Cobb.)

mately associated with him, first as his attorney and later as both his attorney and trustee to take care of his property.

Q. Now, I want you to state to the jury, Mr. Cobb, exactly the type of man Mr. Tuppela was, regarding his education, his [215] mentality and the condition of the man generally to take care of himself and his property?

A. Mr. Tuppela was an old man. He is now, I believe, sixty-nine years old. Three years ago he was between 66 and 67. He had been confined some three years in the asylum—three and a half years—as an insane. He was an old prospector who couldn't read or write English; couldn't draw a check. He could read, so he said and his friends, Finnish print, but writing he could neither do nor read. He had a very weak mentality. He could remember and state clearly and distinctly things that he had done in the process of mining, but he didn't have sufficient mentality to grasp anything much beyond that. He couldn't give you any narrative account of anything he had done, nor would he appreciate, seem to appreciate the bearing of one fact upon another.

Q. Now, Mr. Cobb, in the preparation of the case of Tuppela vs. the Chichagoff Mining Company, was Mr. Tuppela of such mentality that he was of any use to his counsel in preparing the case; that is, in looking up witnesses, interrogating witnesses, and did he have any ideas about what was pertinent facts of a lawsuit?

(Testimony of J. H. Cobb.)

A. He hadn't the slightest idea of the pertinency of any fact to his case, further than that he had located a claim and that it was his. That was as far as he seemed to grasp anything. He was not of the slightest help—couldn't be, owing to his situation and his mental capacity, and at no time could I depend upon him—nor did I try—to look up any testimony or interview any witness in the case or to report to me what the witnesses would testify to, because he was [216] mentally incapable of doing that in such a way that it could be depended upon. Whenever there was a witness to be looked up, I went to see him.

Q. Now, at the time that you met Mr. Tuppela and entered into your contract with him, I will ask you to state the financial condition of Mr. Tuppela if you know?

A. Mr. Tuppela, at the time that Judge Winn associated me with him in the case, or asked me to look into it to see whether we would take the case, which was about April 25th, was a pauper, supported by the institution known as the Pioneers' Home at Sitka, and he had been there since some time early the preceding March. I subsequently learned, in paying the bills, that he had been supported in part by Judge Winn before he went over there, and in part by some Finns here, from the time he reached here until he went to the Pioneers' Home. When he come over from Sitka, he was dressed in rags and looked like a scarecrow.

Q. Now, regarding the expenses of your case of

(Testimony of J. H. Cobb.)

Tuppela vs. the Chichagoff Mining Company, I will ask you if your contract provides for expenses?

A. It does. Mr. Tuppela had nothing in the world—

Mr. ROBERTSON.—(Interrupting.) Well, now, of course, that is not answering the question.

A. How is that?

Mr. ROBERTSON.—That's not answering the question.

The COURT.—Yes; simply what the contract provides; if it provides for the expenses.

A. It does.

Q. Just read that portion of your contract, if you will, Mr. Cobb. [217]

A. (Reads:) “The parties of the second part,” —that is Judge Winn and myself—“agree to bring and prosecute, to final judgment, said suit, with all reasonable skill and diligence and to advance the party of the first part the necessary costs and expenses of such suit.”

Q. Was that done by the parties—by the counsel for Mr. Tuppela?

A. It was, or we couldn't have proceeded at all.

Q. I will ask you to state, Mr. Cobb, if you know, approximately the costs of the case of John Tuppela vs. the Chichagoff Mining Company?

A. Do you mean the entire expenses that we had to pay out?

Q. Certainly? A. I know exactly what it was.

Q. Just state it.

A. From the time that we filed suit, paid the

(Testimony of J. H. Cobb.)

filing fees here, until we realized on the judgment the following year, Judge Winn and myself paid out \$5,100.70, and we didn't waste any money because we didn't have any to waste.

Q. Now, Mr. Cobb, of course as counsel, you were familiar with the case of Tuppela against the Chichagoff Mining Company? A. I think I was.

Q. Now, I will ask you when it appeared in that case, or in the preparation of that case, when it appeared that three men by the name of Hanlon, Bauer and Peterson became necessary, or appeared that they would be witnesses in that case?

A. Not until the answer of the Chichagoff Mining Company was filed. The case was in this shape—

Mr. ROBERTSON.—Now, wait a minute. Just answer the question.

Q. Just state how it happened to appear at that time. [218]

A. I can't make that clear without stating the status of the case at the time it was filed.

Q. Just state, then, the way that case was developed?

A. When the case was first presented, the Chichagoff Mining Company was in possession of the ground, claiming it under the deed made by Mills, the purported guardian of John Tuppela, and the single question that would naturally and inevitably present itself to a lawyer's mind was whether or not that was valid or invalid. After the suit was instituted, we simply attacked that deed and asked

(Testimony of J. H. Cobb.)

to have it placed back *in statu quo*. The Chichagoff Mining Company repudiated, so far as the Over-the-Hill claim, which was the valuable one, was concerned, the title under the Mills deed to this extent: that they denied that Tuppela or Mills either had ever had any claim to it, but went back to a man by the Name of Bauer, whom Tuppela was a partner of and advertised out. That was the only thing that it was necessary to prove back of the deed from Mills to the Chichagoff Mining Company and to set that aside.

Q. Now, I will ask you if upon the trial of that case, if Bauer and Hanlon were witnesses in behalf of the plaintiff.

A. They were not. They were witnesses in behalf of the Chichagoff Mining Company.

Q. Now, there have been some letters in evidence. Before we get to that, I think there's one that you wrote, as Mr. Mathison claims, some time in July, 1919. A. July 17, 1919.

Q. Just state to the jury how that happened, if you will.

A. After I brought suit and got service upon them, there was nothing to do until we got them in court. They had thirty [219] days in which to answer. As soon as their answer was filed, I immediately made application to the Court for an order of survey to go over and look at that mine—restrain the defendant from interfering with us in any way in going through the workings and seeing what they had. As soon as that was over with, I

(Testimony of J. H. Cobb.)

immediately made preparations for the trial and got a bunch of papers from Mr. Tuppela, pertaining to his mining claims, consisting of location notices, and so on, and among them I discovered this contract with Mr. Mathison. I asked him about that and he gave me the information that he was out of the case, as I wrote Mr. Mathison; that he had been unable to raise the money and so on, and some of the papers being missing that he ought to have, and telling me that Mr. Mathison had had all his papers as long as he was in Astoria, I wrote that letter to Mr. Mathison, asking him to look through them and to return any of his papers.

Q. And that is a letter to which you did not receive a reply?

A. I did not receive a reply for the reason, as Mr. Mathison has just stated, that he took me to be a real estate agent.

Q. Now, I will ask you if it ever has been your habit or custom in any wise to advertise as an attorney at law, or counselor at law?

A. No; never has. When I was associated with Mr. Maloney for about thirteen years after I came up here, he attended to getting out the letter-heads and had "Maloney & Cobb, attorneys at law" put on them.

Q. Then your letter-heads have always appeared—

A. For a great many years they simply bore my name and address for the convenience of parties that I was writing to, in case they should not be

(Testimony of J. H. Cobb.)

able to decipher my signature. [220]

Q. Now, you have stated that you have been an attorney since 1884? A. Since 1884.

Q. And you have practiced in the Territory about how long?

A. Twenty-five years next January.

Q. I will ask you if you are a member of any association of attorneys.

A. I am a member of the Alaska Bar Association and a member of the American Bar Association.

Q. Now, I will ask you Mr. Cobb, if, to your knowledge, the American Bar Association publishes a list of its members?

Mr. ROBERTSON.—What has that to do with all this?

Mr. WINN.—Just simply to show that if Mr. Mathison wanted to find out the business of Mr. Cobb, it would have been very easy for him to refer to the directory of the American Bar Association, and through what I am about to ask about.

Mr. MANNIX.—We object to that.

Mr. ROBERTSON.—We object to that as incompetent, irrelevant and immaterial, as to what he might have looked up.

The COURT.—Objection sustained.

Q. Now, Mr. Cobb, later on, did you receive any letters at all from Mr. Mathison?

A. Addressed to me?

Q. Yes; addressed to you?

A. Yes; I received one.

Q. When was that, if you remember?

(Testimony of J. H. Cobb.)

A. Why, I got that letter just about the time that Judge Jennings had decided the case against us here—the letter in which he asked for Mr. Tuppela's address, which I had already furnished him. [221]

Q. Now, I will ask you if that is the letter (exhibiting letter)? A. Yes; that's the letter.

Q. That is Plaintiff's Exhibit No. 8. Now, is that in answer—I will ask you if that is in answer to your letter, Plaintiff's Exhibit No. 5?

A. No; no it isn't. Doesn't answer anything that I stated in there.

Q. Now, the letter you received from Mr. Mathison dated February 20, 1920, I will ask you if you answered that letter?

A. He says that I didn't. Mr. Mathison is very likely correct about that. I have looked through my file and I don't find any copy and I keep copies of most of my letters, especially of that type. Likely, to the best of my recollection, it simply asked for Mr. Tuppela's address, which I knew he already had. As I say, at that time Judge Jennings had just decided the case against us and I was exceedingly anxious to get it into the Court of Appeals the first of the May term, and from the time of his decision, from the time it was handed down, up to the time I left for San Francisco to argue it, I was extremely busy getting the case in shape and getting it briefed for a prompt hearing in the Appellate Court.

Q. I will ask you, Mr. Cobb, what was Mr. Tup-

(Testimony of J. H. Cobb.)

pela's habit regarding bringing you all his mail, or if you know how Mr. Tuppela received his mail.

A. From the time that I became his counsel, or very shortly thereafter, Mr. Tuppela asked me one day to see if there was any mail for him. He had considerable difficulty in speaking, enunciating distinctly, on account of having lost his upper teeth. I notified the postoffice to put all his mail in my [222] box. I think that must have occurred in June or July, 1919. From that time on up to the present time what mail Mr. Tuppela has had here has been put in my box, whether it was addressed in my care or not. And I read his letters to him when they were in English. I now have only one letter that he received—and he showed them all to me—written in Finnish, or two letters rather—two letters written in Finnish.

Q. Were either one of those letters from Mr. Mathison? A. No.

Q. Mr. Cobb, I think you stated the date that you entered into negotiations or became connected with this case of Tuppela vs. the Chichagoff Mining Company? A. Second day of May, 1919.

Q. And you remember when that case was filed, instituted here in court?

A. It was filed on the tenth.

The COURT.—I thought you stipulated that it was the eighth.

Mr. COBB.—No; the tenth. The contract of employment was prepared and the pleadings were prepared between the second and the ninth. The con-

(Testimony of J. H. Cobb.)

tract was signed on the ninth, and I am not sure, but I think the original complaint was verified on the eighth day and filed on the tenth.

Q. When was the case tried, if you remember?

A. The following November.

Q. And judgment, I think, you stated was entered here some time in—

A. Judge Jennings— The verdict of the jury was rendered on the 29th day of November—advisory verdict in an equity case. Judge Jennings took the matter under advisement until the latter part of the following February, when he handed [223] down his decision. The record was completed for filing in this Court on the 19th day of March. I got that record in shape and got it off three days later to the Circuit Court of Appeals, and it got there with two days only to spare to get on the May term, 1920, of the Circuit Court of Appeals.

Q. And there—

A. (Interposing.) And there the judgment was reversed. The plea of laches that was successfully sustained here, in the oral argument was practically abandoned.

Mr. ROBERTSON.—Now, wait. The record is the best evidence on that.

The WITNESS.—There is no record of that.

Mr. WINN.—That is outside of the record.

The COURT.—He may testify. Objection overruled.

Q. Go ahead and explain.

(Testimony of J. H. Cobb.)

A. We had pleaded that the property was much greater in value than \$1,000, which is what they paid for it at the guardian's sale, and that there was in law no consideration at all. The inadequacy of the consideration for the property was alone sufficient to set aside the guardian's sale and we introduced such testimony as we could get as to the value of the property. In answer to that it was testified by Mr. Freeburn that the property had very insignificant value in 1915, at the time they bought it, and that they thought it of so little worth that as a matter of fact they didn't develop it at all; and that they had run the tunnel which disclosed the ore bodies for the purpose of getting waste ground to fill in the stopes on their own ground as the ore was drawn off, and upon calling attention to that, that they [224] hadn't spent any money in developing it, as they plead, why the plea of laches, of course, that failed.

Mr. ROBERTSON.—We move to strike that out as not the best evidence and also as hearsay and not responsive to the question.

The COURT.—Motion denied. I don't think it is very material one way or the other, but I will deny the motion.

Q. I will ask you to state to the jury if you know where Mr. Tuppela is at the present time?

A. He is in Minneapolis.

Mr. ROBERTSON.—I ask that that be answered yes or no. Do you know?

The WITNESS.—Yes.

(Testimony of J. H. Cobb.)

Q. Whereabouts?

A. In Minneapolis, in an institution for the insane.

Q. Now, Mr. Cobb, I will ask you— Possibly they will admit that I was appointed guardian of the person of Tuppela either the thirtieth or 31st of July.

The COURT.—It is admitted in the pleadings.

A. Admitted in the pleadings.

Mr. WINN.—I think that's all.

Cross-examination.

(By Mr. ROBERTSON.)

Q. Mr. Cobb, in the winter of 1919, February, at the time that Judge Jennings handed down—

A. (Interrupting.) 1920.

Q. (Continuing.) —1920, when Judge Jennings handed down his opinion holding against Tuppela in the Tuppela-Chichagoff Mining Company case, about that time was the time that you [225] also received a letter from Mr. Mathison?

A. Somewheres along that time. The letter, I believe, is dated the 20th of February.

Q. Yes, sir.

A. And it might have got here any time from five days to a week later.

Q. And Judge Jennings' decision, as you now recall, was handed down on February 25th?

A. I don't recall the exact date of it, but it was about that time.

Q. In other words, you got that letter about the

(Testimony of J. H. Cobb.)

same date that Judge Jennings' opinion was handed down? A. I think it was a day or so later.

Q. Yes. Now, then, Mr. Cobb, how did you find Mr. Tuppela as a witness in assisting you to try the case? A. How is that?

Q. How did you find Mr. Tuppela as a witness in assisting you to try the case against the Chichagoff Mining Company?

A. He was very clear in his testimony which was limited to just what he had done in the way of locating and doing his assessment work.

Q. As a matter of fact he was very rational, was he not? A. Oh, yes; he was rational.

Q. Had a very good mentality.

A. No; I wouldn't say that. As I stated before he was very clear upon what he had done himself as a prospector, but anything beyond that, his mind wasn't—didn't seem to connect things.

Q. Now, as a matter of fact he stood cross-examination in that case exceedingly well, did he not? [226]

A. How is that?

Q. I say as a matter of fact, he stood cross-examination exceedingly well, did he not? A. Yes.

Q. Exceptionally well.

A. He simply told the jury the facts and stuck to them.

Q. Weren't you surprised that a man of his mental condition was able to so well withstand cross-examination? A. No; I was not.

Q. You were not?

(Testimony of J. H. Cobb.)

A. I was not. I found by practical experience that the man who is telling the truth is the man who usually stands the best cross-examination.

Q. I see. His testimony in that case was very clear, was it not?

A. Reasonably so, the way he expressed himself.

Q. Nothing in that case to indicate that he was at all mentally deficient, was there?

A. There was a circumstance especially in it, Mr. Robertson—

Q. I see.

A. (Continuing.) Which will illustrate just what I said about him.

Q. Now, then, do you remember the time that you had the proceedings down in the probate court, as a result of which Mr. Winn was appointed guardian of the person of Mr. Tuppela? A. Yes.

Q. Now, is it true that up to June 28th preceding that—that would be up to June 28, 1921—that Mr. Tuppela was perfectly rational? A. At first—
[227]

Q. (Interrupting.) No; wait. Answer that yes or no. A. No.

Q. He was not? A. I don't think so.

Q. I will ask you as to whether or not, in testifying before the Commissioner at those proceedings, you didn't state that up to June 28, 1921, Mr. Tuppela was perfectly rational at all times?

A. My recollection is that—

Q. (Interrupting.) I asked you to state whether or not you did make that statement?

(Testimony of J. H. Cobb.)

Mr. WINN.—Well, he is testifying as to his recollection.

A. My recollection is that it was the twenty-sixth or seventh. I may have said the 28th. I don't recall whether I did or not, but when I said "No," I had in mind my present recollection that the first signs of insanity were showing a day or two earlier than that.

Q. Up to June 26th or 7th, 1921, he was perfectly rational?

A. As far as I know and believe, he was.

Q. During all the previous time that you had known him, is that correct? A. How is that?

Q. All the previous time that you have known him— A. All the previous time.

Q. He was perfectly rational? A. Seemed to be.

Q. And at that time, on June 25th, 26th, or 27th, about these dates, I don't know which one, is the first time that Mr. Tuppela gave you any indication that he lacked sanity?

A. The only time I had seen any. [228]

Q. Prior to that time, he had never indicated to you that he was not sane, is that so?

A. No. I might state that he was examined before that upon a complaint being made that he was insane.

Q. But you, yourself?

A. I myself never saw anything.

Q. Never saw any indications prior to that time of insanity? A. No; not that I recall.

(Testimony of J. H. Cobb.)

Q. Well, you so testified in the proceedings, did you not? A. I think I did.

Q. His mental condition prior to that time was perfectly rational, was it not?

A. Yes; that is, he didn't seem to be insane at all.

Q. And he stood cross-examination well in the Chichagoff Mining case?

A. Yes, I said he stood that very well.

Q. And his testimony was clear, was it not?

A. Reasonably so.

Q. Now, didn't you testify at that hearing, proceedings before the Commissioner that his testimony was clear—not reasonably clear, but that it was clear in that case?

A. I don't recall just the words I used, but the facts were that it was clear; that he stood cross-examination well and you may call it reasonably clear or clear, I don't recall just what I said. It would mean practically the same thing.

Q. You don't mean or intend to convey, in using the words "reasonably clear," that it wasn't clear in—

A. (Interrupting.) I mean this, if I can make it perfectly plain to you and to the jury: some men's testimony is perfectly [229] sane, but not clear, because they don't express themselves well. There are other men whose ideas are not clear, but they express themselves clearly. John Tuppela had great difficulty in expressing himself, but considering the man's education—practically none at all—his difficulty in speaking, the narrow scope of his

(Testimony of J. H. Cobb.)

mentality, and so on, I thought, taking all those things into consideration, that his testimony, both on direct and cross-examination in the case of John Tuppela against the Chichagoff Mining Company, was remarkably clear.

Q. You thought it was remarkably clear.

A. Yes; if it was simply limited to what he had done as a prospector.

Q. So far as you recall at this time, there was none of the jurymen thought that there was anything— A. (Interrupting.) How is that?

Q. None of the jurymen that thought it wasn't clear, either?

Mr. WINN.—Oh, I object to that.

The COURT.—Objection sustained.

Q. Now, in that case, Mr. Cobb, Mr. Tuppela testified in the English language, did he not?

A. Yes.

Q. No interpreter? A. No.

Q. Testified as a witness; was on the witness stand right in this room? A. Yes.

Q. And gave his testimony in English?

A. Gave his testimony in English. [230]

Q. Both on direct examination and cross-examination? A. I think so.

Q. Well, that is your recollection, is it not?

A. That is my recollection. I'm satisfied I'm correct about it. There was a party that wanted to act as interpreter, but I didn't use him.

Q. And his testimony was clear under those circumstances? A. Just as I have stated.

(Testimony of J. H. Cobb.)

Q. After Judge Jennings' decision and oral opinion on February 25, 1920, you, as counsel for Mr. Tuppela, exerted rather strenuous efforts, did you not, to raise sufficient money to take your case to the Circuit Court of Appeals? A. How is that?

Q. I say, after Judge Jennings, on February 25th, had handed down his opinion which was against Mr. Tuppela, you, on behalf of Mr. Tuppela exerted rather strenuous endeavors to raise sufficient money to, to get sufficient money to take the case to the Circuit Court?

A. I don't know what you mean by "strenuous efforts." Judge Winn was away at the time and I had to raise about \$2,000 and I got it.

Q. Now, in getting that \$2,000, you importuned various people to assist you—

Mr. WINN.—Now, I object to that as not proper cross-examination and immaterial. Has nothing whatsoever to do with this case.

Mr. ROBERTSON.—Well, Mr. Cobb testified that he and Mr. Winn put in so much money—\$5,100.71

The COURT.—No, no.

Mr. ROBERTSON.—As costs. [231]

The COURT.—He testified that he put in so much; that the costs were \$5,100.70. That is what his testimony was.

Q. Did you testify that you and Judge Winn put up as costs in the case, \$5,100.71?

A. I don't recall just whether I expressed it that way or not. The idea I intended to convey was that

(Testimony of J. H. Cobb.)

the actual cost—the money was all paid through me—was that the actual cash that I paid out in the progress of that litigation was \$5,100.70.

Q. And you didn't personally put it all up?

A. No; I didn't put it all up.

Q. Judge Winn didn't put it all up? A. No.

Q. I am not asking you who put it up, but various people put it up? A. No.

Mr. WINN.—Now, I object to that.

Q. Did Mr. Tuppela put it up? A. No.

Q. Did it take you some time to raise the money before it could be put up? A. No.

Q. Did it take you a week to do so?

A. I don't recall?

Q. Took you a few days, did it not?

A. I don't recall how long it took me to make the arrangements that I did make to get the money that I needed to save that case.

Q. You do remember that it took you some time to get the money?

A. Oh, I didn't do it in a minute. [232]

Q. No; and you didn't do it in a day?

A. I don't recall.

Q. Did you do it in two days?

A. I don't recall.

Q. You didn't have the money personally to put it up?

Mr. WINN.—Now, I object to that.

The COURT.—Objection sustained.

Mr. ROBERTSON.—I reserve an exception.

Q. Did Mr. Tuppela have the money personally?

(Testimony of J. H. Cobb.)

Mr. WINN.—Now, I object to that. He has already gone over that with this witness.

The COURT.—Well, he may answer that question.

The WITNESS.—What is it?

The COURT.—If Mr. Tuppela had the money or not? A. Mr. Tuppela did not.

Q. Judge Winn put any up?

A. Judge Winn was in Los Angeles at that time and until after the case had gone to the Appellate Court, and he couldn't and didn't put up anything.

Q. Now, then, at the time that you wrote to Mr. Mathison on July 17, 1919, Plaintiff's Exhibit No. 5, that was at the time that you stated on direct examination that you had gone over the papers of Mr. Tuppela and found that Mr. Mathison had this contract, and that you understood that he had more papers belonging to Tuppela and you wrote then about it?

A. Mr. Tuppela told me that he had turned all his papers over to him. That is the only reason I had to think that he had any.

Q. And you wrote personally to Mr. Mathison at that time? [233]

A. Yes, and gave him Mr. Tuppela's address, which he afterwards wrote and asked me for again.

Q. Now, then, Mr. Cobb, in February, 1920, at almost the identical day that you received Enoch Mathison's letter, in which he referred to this matter, that was almost the same day on which

(Testimony of J. H. Cobb.)

Judge Jennings handed down his decision in this court against you and which you were then seeking to obtain money to get into the Circuit Court of Appeals in April so as to get it in there on the May term, why didn't you write Enoch Mathison then, knowing that he had had a contract with Mr. Tuppela, and ask him to assist you in the appeal?

A. I think probably, if it ever occurred to me at all, the reason that I didn't was that Tuppela told me that Mathison threw up the case because he didn't have money to come to Alaska on.

Q. That was the reason?

A. I don't know if it occurred to me to write to Mr. Mathison. He was a stranger to me.

Q. That is the best reason you can give to the jury?

A. That is as good a reason as I can give them. It never occurred to me at all.

Q. Never occurred to you at all.

A. A stranger living in Astoria, and whom I'd been informed had thrown up the case, to advance any money?

Q. You knew Mr. Mathison was an attorney, didn't you.

A. Oh, yes; I knew that he was.

Q. Pardon me? A. I knew that he was.

Q. You knew prior to that time that he had been Mr. Tuppela's [234] attorney, didn't you?

A. I knew that at one time he had a contract with him.

Q. Prior to that time? A. Yes.

(Testimony of J. H. Cobb.)

Q. You had a copy of the contract in your possession, didn't you? A. How is that?

Q. You had a copy of the contract in your possession at that time, didn't you? A. I think I did.

Q. Yes, sir.

A. Had all of Mr. Tuppela's papers.

Q. And you didn't write to Mr. Mathison in any manner whatsoever? A. Certainly not.

Q. Now, then, Mr. Cobb, you filed a complaint in the Chichagoff Mining Company case on May tenth, 1919, didn't you, as you have stipulated here?

A. That is my best recollection. The record will show the exact date.

Q. Well, you stipulated that that is the date.

A. Yes.

Q. And the summons; so that you instituted suit on that date? A. Yes.

Q. Now, I ask you, Mr. Cobb, didn't you have to file an amended complaint before you could maintain your action in that suit?

A. I filed an amended complaint.

Q. Yes. Why did you file an amended complaint?

A. I don't remember. I filed it voluntarily.
[235]

Q. You didn't file it just for the fun of the thing, did you? A. Oh, no.

Q. You filed it because you thought it was necessary.

A. I filed it because I thought it was a better way of proceeding.

(Testimony of J. H. Cobb.)

Q. Yes, sir. A. Undoubtedly.

Q. And do you recall when you filed your amended complaint, the complaint on which you won? A. How is that?

Q. Do you recall when you filed the amended complaint, the complaint on which you won?

A. I think it was tried—

Q. No; do you recall when you filed it?

A. I do not.

Q. It was some time after you filed the original complaint, wasn't it?

A. Oh, yes; it was afterwards, of course. You couldn't file it before you make an amendment.

Q. Well, I say, some time after. You understand, Mr. Cobb, that part of it. Now, then, Mr. Cobb, I understood you to tell the jury that it never became necessary, in the case against the Chichagoff Gold Mining Company, to have Bauer, Hanlon and Peterson as witness until after the pleadings set up by the defendant in answer to your amended complaint, is that correct? A. How is that?

Q. That it never became necessary to have Bauer, Hanlon or Peterson as witnesses until after the facts developed by reason of the answer that the Chichagoff Mining Company set up to Tuppela's amended complaint—isn't that correct? [236]

A. I think so.

Q. And that Bauer, Peterson and Hanlon were witnesses for the Chichagoff Mining Company?

Mr. WINN.—Now, if the Court please, that is not his testimony.

(Testimony of J. H. Cobb.)

The COURT.—No.

Q. Wasn't that what you testified, Mr. Cobb?

A. Repeat that question.

Q. That Bauer, Peterson and Hanlon were witnesses for the mining company?

A. No; I didn't testify to that. The testimony was that Hanlon and Bauer were called to testify for the Chichagoff Mining Company.

Q. Who did Peterson testify for?

A. How is that?

Q. Who did Peterson testify for?

A. We took Peterson's deposition.

Q. Peterson testified—

A. (Interposing.) On behalf of the plaintiff.

Q. (Continuing.) For Tuppela, did he not?

A. Yes.

Q. And Mr. Peterson's evidence, at that time you introduced, did you not, Mr. Cobb?

A. How is that.

Q. I say at the time of that case you introduced Mr. Peterson's evidence because you considered it material to your case, did you not?

A. It was very material after that answer was filed in which they had repudiated title that they had bought from Tuppela.

Q. Certainly. Now, then, you stated, Mr. Cobb, that you never advertised. Is that correct? [237]

A. No, I didn't say that.

Q. Pardon me?

A. I didn't say that. If I did, I didn't mean it.

Q. You never advertised as an attorney, I mean.

(Testimony of J. H. Cobb.)

A. I haven't for a good many years. When I was younger, that is at the time when I was in partnership with Mr. Maloney, I think he carried a card, but I don't recall how long I myself put a card in the paper or had an advertising letter-head.

Q. You do carry advertisements in some of the legal lists, do you not?

A. My name appears in most of the lawyer lists that pretend to give a complete one, and for quite a while I made up the rating of Alaska attorneys for Martindale, in consideration of which they printed my name in it in caps, or heavy face letters, but they paid me besides for the work I did, and as a part of that, they sent me their directory. I don't carry any card in it.

Q. What?

A. I don't carry any card in it.

Q. You don't mean to say that it doesn't appear in Martindale's as attorney at law at Juneau, Alaska? A. Yes.

Q. Instead of having advertising rates, you perform the labor of giving them a rating on the rest of us here in Juneau, is that correct?

A. Well, throughout Alaska, so far as I know. They wrote to me some years ago and asked me to make this arrangement and I consented to do this.

Q. You carry your name in a few other lists, don't you? [238]

A. I don't know. That is the only one I have outside of the American Bar Association.

(Testimony of J. H. Cobb.)

Q. You don't carry your name in any other at all? A. How is that?

Q. You don't carry your name in any other at all?

A. If they put it in there, it is not with my knowledge or with or without my consent. I don't know anything about it and don't care anything about it.

Q. And if your name appears in any of them—

Mr. WINN.—(Interrupting.) I object to that, if the Court please.

Mr. ROBERTSON.—Very well.

Q. Now, then, Mr. Cobb, how long have you been practicing law at Juneau?

A. It will be twenty-five years next January.

Q. Continuously?

A. Except— Yes, I might say continuously.

Q. You have been practicing law continuously for the last twenty-five years in Juneau?

A. Yes; been out a few times.

Q. With some exceptions? A. How is that?

Q. With some exceptions?

A. With some exceptions?

Q. Yes, sir.

A. No; I have been practicing continuously.

Q. You mean to say that you have been practicing continually in Juneau for the last twenty-five years, without any exception whatsoever?

A. I said that I had been out a few times. I know what you're fishing for. Why don't you come out and ask about it? [239]

Q. I want to know whether you are going to make

(Testimony of J. H. Cobb.)

the general statement that you have practiced the last twenty-five years, or haven't. A. I have.

Q. Continuously?

A. Continuously except when I have been out of the Territory. I think the longest I was ever out was last winter—five months.

Q. When you made out the trust agreement, Mr. Cobb, with Mr. Tuppela on August 19, 1920, who was present there at the time when you had that signed up? A. The witnesses to it were there.

Q. Who was that? Do you recall?

A. Mr. Valentine was one of them and there was some Finnish—Ada White, who was stenographer and notary public in the office of E. Valentine, was a witness, and there were some Finnish friends, whose names I don't just recall, of Tuppela.

Q. You didn't have any of his Finnish friends sign as witnesses? A. I did not.

Q. Which one of his Finnish friends acted as interpreter?

A. I think it was Frank Oja, if I recall.

Q. Where is Frank Oja now?

A. I don't know.

Q. Has he left the Territory?

A. I don't know.

The COURT.—What is the purpose of this?

Mr. ROBERTSON.—Well, Mr. Cobb has testified that this man can't read English. Now, I have got a right to show that he has got an agreement, signed by him, and to find out whether it was interpreted.

(Testimony of J. H. Cobb.)

The COURT.—Objection? [240]

Mr. WINN.—Yes, if the Court please.

The COURT.—Objection sustained. The question of the validity of that agreement is in no way in issue in this case.

Mr. ROBERTSON.—Oh, no. That wasn't the purpose at all.

Q. Referring to Plaintiff's Exhibit No. 14 in this case, Mr. Cobb, signed by John Tuppela in the presence of yourself as notary public, one of the pleadings in the case—

A. (Interrupting.) The reply to the amended answer?

Q. Yes, sir. A. Yes.

Q. I call your attention to the fact that it appears that you took Mr. Tuppela's verification on it?

A. Yes.

Q. Who acted as interpreter in that case for Mr. Tuppela? A. There wasn't any interpreter.

Q. There wasn't any interpreter?

A. No. He could understand English if it is spoken clearly and you try to make him understand; that is, he could understand sufficiently to swear to a pleading on the best of his knowledge and belief that it was true—"I verily believe," as the form goes.

Q. Well, you had no difficulty in explaining to him the various facts in such pleadings as you drew for him without the use of an interpreter?

A. I don't think, since you ask me the question,

(Testimony of J. H. Cobb.)

that Mr. Tuppela at all had any accurate grasp of the meaning and effect of that reply.

Q. You don't think he had it?

A. I explained the best I could and he signed it and swore to it [241] as he verily believed.

Q. Yes, sir.

A. But to say that he had sufficient mentality to grasp the full significance of a pleading of any kind, I don't think he did.

Q. You don't think he had mentality to understand a pleading of any kind, as a matter of fact, is that what I understand you to say?

A. I wouldn't say a pleading of any kind. I would say the ordinary pleadings, expressed in legal verbiage, as they are.

Q. Now, you make that statement even though you do contend, at the same time, that up to June 26, 1921, he was perfectly rational all the time, as I understand you?

A. If you want to put it in that argumentative way, I think that's about right.

Q. I don't intend to put it in any argumentative way. I just wanted to know whether or not you would qualify that any by your previous statement that up to June 26th or 27th, 1921, he was rational.

A. No; I don't want to qualify it in any way.

Q. What did the bills consist of that Judge Winn paid up to the time that you first met Mr. Tuppela?

A. How is that?

Q. You stated in your direct examination, that you found that Judge Winn had paid a great many

(Testimony of J. H. Cobb.)

bills from some time before up to the time that you met Tuppela.

A. No, I didn't say a great many.

Q. Well, all right—bills. What bills were they?

A. I don't recall. They were down to some of these Finnish boarding-houses. They amounted to something like fifty or [242] sixty dollars. It was afterwards taken into account and repaid to Judge Winn under the contract; and there were other bills that Judge Winn stood good for—that he paid himself.

Q. And that, I understand that that was on April 25th, when you ascertained at that time about the financial condition of Tuppela; is that correct?

A. How is that?

Q. That was on April 25th, 1919, that you ascertained the financial condition of Tuppela?

A. No.

Q. Wasn't it? What date was it?

A. I had no occasion to inquire into it except in a general way what his financial condition was on that date. That was the date as I recall it that Judge Winn asked me—Judge Winn spoke to me before he went to Sitka, before the Governor sent him to Sitka as a public charge—to bring this case, stating that he had been busy on some of these pirate cases and had intended to, or had looked into it and didn't have any contract with him and hadn't determined whether he was going to bring it or not, but he asked me to come into it if I thought he

(Testimony of J. H. Cobb.)

could win it. I told him that I thought it could be won. That was the 25th.

Q. The 25th of April?

A. The 25th of April, if I recall the date. And I sent for Tuppela to Sitka to come over. He reached here on the second of May, and I talked a little with him that day and he came up the next day and I at once prepared the pleadings. I went to see Judge Winn with him and we talked over the matter of compensation and it was agreeable to him that the amount that [243] we asked, in view of the work to be done and the risks to be assumed and the costs that we were going to be put to, should be put in, and he stated that we would have to provide for his support—he was too old to support himself—and I told him I would put it in. He wanted us to pay the costs because he couldn't. I told him that some courts objected to going into such a contract, but that I thought, under the peculiar circumstances, that it was proper and put it in. The contract was prepared and the pleadings were also prepared and Mr. Tuppela went away, and I told him I would let him know when I wanted him, and I think he came back maybe once or twice in the meantime, I don't know, but he was in my office again on the ninth, verified the complaint and signed the contract.

Q. Now, as a matter of fact, prior to that time, Mr. Cobb, you had been trying the case of Hanlon vs. the Chichagoff Mining Company?

A. I had tried that the preceding spring, I

(Testimony of J. H. Cobb.)

think—maybe that same spring. I don't just recall the date.

Q. That preceding spring that Tuppela came—that Judge Winn called Tuppela to your office?

A. How is that?

Q. This preceding spring of 1919—is that correct?

A. I think that that case—Judge Winn was on the other side—

Q. (Interrupting.) Mr. Faulkner, wasn't it?

A. No, no; in another case. No; that was defended by Mr. Faulkner. As I recall it now, that was tried the preceding term of court.

Q. And you waited until you had finished that case before you [244] *you* ascertained whether or not you were in a position to accept the position as Tuppela's counsel? A. How is that?

Q. And you had to wait until the termination of that action before you were able to ascertain whether or not you were in a position to—

A. (Interrupting.) Oh, no. No; that case was out of the way before I had any knowledge that Tuppela was out of the asylum even.

Q. Before you had any knowledge that he was out of the asylum? A. Yes.

Q. I see.

A. And quite a while before Judge Winn asked me to become associated with him in the trial of the Tuppela case.

Q. That case did pertain also to a part or some

(Testimony of J. H. Cobb.)

of the same property that involved the claim of Tuppela?

Mr. WINN.—I think this has gone far enough. It is not proper cross-examination. Doesn't pertain to any facts in this case.

The COURT.—I'll hear from you.

Mr. ROBERTSON.—Very well.

The COURT.—Objection sustained.

Q. You say that Mr. Tuppela is back in Minneapolis, in some institution? A. How is that?

Q. You say that Tuppela is now in Minneapolis in some institution. What institution is it that he is in?

A. Well, sir, I have a poor recollection of names; pretty good memory for everything else. His guardian here can tell you. The information comes from him. I didn't go back there myself. I simply furnish the money as his trustee.

Q. You don't know, then, as a matter of fact, where he is except [245] that he is in Minneapolis? A. How is that?

Q. I say, you don't know where he is, as a matter of fact, except that he is in Minneapolis?

A. No; I can't recall the name of the place. It's Lawrence; something like that, I think—Doctor Lawrence's sanitarium.

Recess until 2 P. M., this day, Nov. 10, 1922.

Friday, 2 P. M., this day, Nov. 10, 1922.

Court met pursuant to recess.

J. H. COBB (on the stand).

(Testimony of J. H. Cobb.)

Redirect Examination.

(By GROVER C. WINN.)

Q. Mr. Cobb, this morning Mr. Robertson referred to an amended complaint filed in the action of Tuppela vs. the Chichagoff Mining Company. I will ask you if that is so? A. Yes, sir.

Q. I will ask you if it is anything unusual to file amended complaints in actions?

A. It is very common.

Q. Was there anything unusual in the filing of this amended complaint?

A. Not that I know of, except I don't recall what it was. There was an omission or an inaccuracy in the pleading. I don't recall what it was. I remember I deemed it proper to file an amended complaint.

Q. You remember about the date that the amended complaint was filed?

A. I looked up the record during the noon recess. It was filed on June 16, 1919. [246]

Recross-examination.

(By Mr. ROBERTSON.)

Q. It was filed, Mr. Cobb, after there had been a demurrer to it, had there not?

A. There was a demurrer interposed by Mr. Faulkner, but I don't recall whether the demurrer raised the point I wanted to amend or not. At any rate, before the demurrer was heard, I asked leave to file an amended complaint, and it was granted,

and the demurrer was then withdrawn and an answer filed. That is what the record shows.

Mr. ROBERTSON.—Now, at this time we desire to move to strike out— In the first place, we make a motion to strike out, as irrelevant and immaterial, the evidence produced by the witness J. H. Cobb, relative to the interposition of the defense of laches by the Chichagoff Mining Company in the case of Tuppela vs. the Chichagoff Mining Company.

The COURT.—The jury will retire to the jury-room. I'll hear you on that.

Mr. ROBERTSON.—The Court will recall, on that point, that that evidence went in subject to our objection. Mr. Cobb, in his testimony later, on cross-examination, possibly on direct, stated that that defense was withdrawn from the Circuit Court of Appeals, or abandoned by the appellee, the Chichagoff Mining Company, and that that doctrine was not passed upon by the Circuit Court of Appeals. Now, of course, we take it that it is a matter of elementary law that this court will take judicial notice of the decision of our own appellate court, and that it appears that the Circuit Court of Appeals, regardless of whether or not it stated positively that such a principle of laches did or did not apply in that case, that [247] The Circuit Court of Appeals, in its decision, sets forth that such a defense was set up by the Chichagoff Mining Company in the lower court, and then went ahead and proceeded to reverse the opinion of the lower court;

necessarily, thereby, overthrowing the defense of laches and necessarily holding that that defense was not a valid defense in that case, because if it had been a valid defense, then the result necessarily would have been a sustaining of the decision of the lower court. We think, for that reason, at this time that it is the settled law by the Circuit Court of Appeals and settled law in this case, that the defense of laches of seventeen or eighteen months—eighteen months is the number of months stated by the Circuit Court of Appeals, considering the mentality and general characteristics of John Tuppela, does not constitute a defense, and therefore, in this case, the jury has nothing whatsoever to do with any such defense.

Now, in addition to that motion, we have two or three other motions that we would like to make. Would your Honor like to have them all made at one time so as to get at them and dispose of them?

The COURT.—Very well.

Mr. ROBERTSON.—We also move, at this time, if the Court please, to strike the defense relative to the nonadmission to practice of Mr. Mathison in this district, there having been no evidence produced whatsoever to show that Mr. Mathison was not a proper person to enter into this contract with Mr. Tuppela, or that there was anything whatsoever which, because of his lack of admission to practice in this district, prevents him from enforcing this contract. [248]

We also move to strike the defense of negligence in the second affirmative defense, which is inter-

posed in this action, on the ground that both as a matter of law under the Circuit Court of Appeals' decision, applying to the peculiar facts of this case, and also that as a matter of fact in this case there is neither any law nor evidence to sustain the defense that Mr. Mathison was in anywise negligent in carrying out his performance or his portion or conditions agreed to be performed under and pursuant to this contract; that there was no negligence and that assuming even though he had done nothing for a period of five months—assuming, for the sake of argument, from March 11, 1918, to August 25th or 26th, 1918—that, under the circumstances of this case, as detailed, would not of itself constitute negligence of an attorney who has entered into a contract which does not provide that the only method by which he can recover his client's rights is by suit, but that he has a right to recover by such means as may be deemed best in his judgment.

Further than that, we move to strike the defense known as the third affirmative defense, which is a defense set up that the plaintiff practiced fraud and imposition upon the defendant Tuppela. We contend that there is an absolute nullity of any evidence in this case of any fraud at any time practiced by Mr. Mathison upon Mr. Tuppela; that there isn't a scintilla of evidence to the contrary except that it was entered into freely by both parties and in the best of good faith.

We also move to strike out the fourth affirmative defense, which in a measure sets up again the negligence of the defendant, and also abandonment of

employment, and we contend [249] in this case, that there is no evidence of any abandonment by Mr. Mathison, of his employment. On the contrary, it shows right along the opposite. He not only advised Mr. Tuppela what his rights were, but that furthermore he certainly pursued Mr. Tuppela to as great an extent as any conscientious attorney could do in pursuing a client in the proper manner. It is true that he didn't hot-foot it after Mr. Tuppela to Alaska, but he pursued methods which we submit to the Court were ethical methods; that is to say, when not having heard from Mr. Tuppela, he made such inquiries as he could and directed from time to time communications to him, endeavoring to ascertain why it was that he had not supplied him with this information.

We move to strike the fifth affirmative defense, which is again on the theory that "if plaintiff did not wholly abandon said contract of employment alleged by him, prior to the time of the employment of other counsel by Tuppela, he was guilty of gross professional negligence, which justified the said Tuppela in discharging him." On this again we submit that there is neither any law in the case nor any evidence which would warrant such defense going to the jury—that there is no laches in this case and no gross negligence. On the contrary, all the way through is shown the good faith of Mr. Mathison and the attempt to reach a position where he could fulfill and carry out such parts or terms of the contract as he was to carry out under the contract; and to the last affirmative defense which sets up a

defense to the third cause of action, that at this time there was not a scintilla of evidence whatsoever to contradict Mr. Mathison's evidence that he did loan or advance \$362.50 to Mr. Tuppela that Mr. Tuppela was to pay [250] back to him.

Whereupon, after argument, the Court granted the first motion and denied the remaining five.

Mr. ROBERTSON.—I would like to again offer in evidence at this time plaintiff's exhibit for identification, the counter-affidavit of John Tuppela, made on September 12, 1919, before J. H. Cobb. We think it becomes material at this time. One reason is that it shows that the defendant employed other counsel very soon after the time that he left Mr. Mathison in Astoria. The other reason is that it is a circumstance to bear out our evidence to the effect that Mr. Mathison advised and informed Mr. Tuppela to not sign any papers when he went back to Sitka.

After argument the fact developed that said affidavit had already been introduced in evidence, and marked Plaintiff's Exhibit No. 17.

Mr. COBB.—I want to present a motion before the jury comes in.

The COURT.—You may do so.

Mr. COBB.—Now come the defendants, the evidence having been concluded, and move the Court to instruct the jury to return a verdict for the defendants upon the second cause of action, on the following grounds, to wit:

First. There is nothing in the pleadings or the

evidence to sustain a verdict against the defendant J. H. Cobb, as trustee for John Tuppela.

Second. Because the evidence shows conclusively that plaintiff was not at the time of the making of the contract sued upon, or subsequently, a member of the bar of Alaska, or qualified to become a member, and not qualified to perform the contract on his part; and it further shows that he never employed associate counsel, as he might have done under the [251] contract, to perform the contract with him, and there was not, and never has been any party to said contract, either originally or by association with plaintiff thereunder, qualified and capable of performing.

Third. Because the suit is based and bottomed upon the allegation that plaintiff was wrongfully discharged by the defendant John Tuppela, and the evidence fails to show that plaintiff was ever wrongfully discharged, or discharged at all. The most that is shown, is that John Tuppela neglected his case and failed to co-operate with plaintiff in his employment, and plaintiff thereupon elected to treat such conduct as a discharge and abandoned his contract.

Fourth. The evidence conclusively shows that plaintiff was guilty of such gross negligence and delay as fully justified Tuppela in ignoring the contract and employing other counsel to protect his rights.

Fifth. Neither the pleadings nor the evidence would sustain a verdict and judgment for plaintiff

on the second cause of action, for this: Tuppela had a legal right to discharge plaintiff as his attorney with or without cause, subject only in the latter case to payment for services rendered and plaintiff's remedy is a suit in *quantum meruit* and not for damages on the contract.

Mr. ROBERTSON.—For the sake of the record, I would like to make a motion for an instructed verdict in favor of the plaintiff as against the defendant, on the second cause of action, for one-half of the sum of \$380,000, or \$190,000; and on the third cause of action for the sum of \$362.50, with interest at six per cent per annum from the date on which this complaint in this action was filed, which was October 13, 1921. [252]

The COURT.—Motion will be denied.

Mr. COBB.—I don't believe there is any ruling upon my motion to instruct a verdict on the second cause of action.

The COURT.—The motion will be denied in both cases.

Mr. COBB.—Note an exception.

And thereupon, the defendants in writing requested the Court to charge the jury as follows:

“Gentlemen of the Jury: The contract upon which the defendant sues in this case, obligated him, as an attorney at law, to bring a suit in behalf of the defendant, John Tuppela, against the Chichagoff Mining Company to recover certain mining property on Chichagoff Island, Alaska. Such a suit could only be brought in the courts of Alaska;

therefore, while the contract is silent as to the place where the suit was brought, it is to be read and construed as though it expressly provided for the bringing of the suit in the courts of Alaska. It further appears that at the time of making the contract, plaintiff was not qualified in law to bring such suit or perform the services he was obligated to perform under it, nor did he, during the time he claims the contract was in force, or at any time, qualify himself to perform the contract by complying with the laws of Alaska, and becoming a member of the bar of this Court. He cannot therefore, recover anything for a breach of said contract, or for any services he may have rendered under it."

But the Court refused said request, and the defendants then and there excepted.

Whereupon the Court instructed the jury as follows:

Instructions of Court to the Jury.

"Gentlemen of the Jury: The plaintiff, Enoch E. Mathison, by this action, is suing the defendant, John Tuppela, J. H. Cobb, as Trustee for John Tuppela, and Grover C. Winn, as guardian of the person of John Tuppela, for damages for an alleged [253] violation of a contract entered into on March 11, 1918, between the plaintiff and the defendant, whereby the said Tuppela employed plaintiff as his attorney to enforce his, Tuppela's claim to certain interests in several mining claims in the Sitka precinct, Territory of Alaska, and for damages for the unlawful withholding and removal of the ore from

said mining claims; also, by a separate cause of action, he is suing the defendants for moneys loaned to Tuppela in the sum of \$362.50 between March 11, 1918, and September of that year.

The complaint which you will have with you when you retire to consider the case in the jury-room, consisted of three causes of action, but the plaintiff has elected to pursue his remedies on the second and third causes of action, and to abandon, for the purposes of this suit, the first cause of action. And, so you will not, in your consideration of the case, pay any attention to the allegations set forth in the first cause of plaintiff's complaint." [254]

I instruct you that this is a civil action and the issues therein are to be determined only by a preponderance of the evidence. The preponderance of evidence is the greater weight of evidence. The burden of proof is upon that party to the action who, in his complaint or answer or reply, alleges the affirmative of any issue.

In every civil action there are what are called the issues in the case. Issues are of two sorts—issues of law and issues of fact. It is the duty of the Court to decide all issues of law and the duty of the jury to decide all questions of fact; and, having been instructed by the court as to the law of the case, it is their further duty to apply the law as stated by the Court to the jury to the facts as found by them and render their verdict accordingly.

The issues in a civil action are presented by means of pleadings, which are supposed to be set forth in

the complaint and answer and reply, and constitute the cause of action of the plaintiff and the defense of the defendant. On the part of the plaintiff the ultimate facts constituting his alleged cause of action or the wrong done him by the defendant are set forth. These facts are set forth in the Complaint. In his answer the defendant sets forth in writing his defense to the action, which may be by way of denial of the facts set forth in the plaintiff's complaint; or, if he has any affirmative matter which in law would constitute a defense to the matter set forth in the complaint, he may incorporate such matter in his answer. The plaintiff may then, in his reply, deny the affirmative matters set forth in defendant's answer, and also may therein set forth any new matter which constitutes a defense to the affirmative matter set forth in defendant's answer, and [255] this new matter set forth in the reply is deemed to be denied without any further rejoinder by the defendant.

Thus, matters set forth in the complaint and denied in the answer, and any new matter set forth in the answer and denied in the reply, and the new matter in the reply, constitute the issues of fact, or the controverted facts in the case, to which the evidence is presumed to be directed.

I have thus given you, in a general way, an informal statement of what the issues of fact are in a civil action. In this case, the pleadings consist of the complaint of the plaintiff; the answer of the defendant and the reply of the plaintiff.

The complaint, as before stated, constitutes two

causes of action only, these being the second and third causes of action, the first cause of action having been eliminated from your consideration.

In the second cause of action, the plaintiff sets forth in substance, that he was, on March 11, 1918, and at all times subsequent thereto, and now is, a duly licensed and qualified attorney at law, having his office at Astoria, Clatsop County, State of Oregon. This allegation is contained in the first paragraph of the second cause of action.

In his answer the defendant denies this allegation on information and belief—that is to say, he puts in issue whether or not the defendant was on March 11, 1918, and subsequent thereto, and whether he is now, an attorney at law, as set forth in paragraph one of the second cause of action of plaintiff's complaint.

In the second paragraph of the second cause of action of plaintiff's complaint, it is set forth that on August 19, 1920, the defendant Tuppela conveyed all his right, title and interest [256] in all his property to J. H. Cobb, as trustee; and that the said Cobb ever since has been and now is, the duly authorized and acting trustee of the property and estate of said Tuppela.

This is admitted in the answer of the defendant, so that it is not an issue of fact in the case and may be accepted by you as an established fact.

In the third paragraph of plaintiff's second cause of action it is set forth that on July 28, 1921, John Tuppela, defendant, was pronounced by the Probate Court of Juneau Precinct an insane person,

and Grover C. Winn was by said court duly appointed guardian of his person, and is now the duly qualified guardian of the person of John Tuppela.

In their answer to this paragraph the defendants admit that same and therefore this is not a controverted fact, and will be taken by you as an established fact.

In the fourth paragraph of the second cause of action of plaintiff's complaint, it is alleged that on or about the eleventh day of March, 1918, John Tuppela, the defendant, entered into a contract with the plaintiff wherein and whereby the defendant engaged and employed the plaintiff as an attorney at law for the purpose of taking the necessary proceedings for the recovery of certain mining properties and money which the defendant claimed he owned and which had been wrongfully taken from him, described as the Over-the-Hill, Pacific, Golden West, Rising Sun and Porphyry lode mining claims located at Chichagof, in the Sitka Recording Precinct, Territory of Alaska; and in said paragraph the plaintiff referred to a certain contract recorded in book 4, pages 116-117 of the Sitka Recording Precinct.

In their answer to this paragraph of the plaintiff's complaint, the defendants admit that John Tuppela entered into a contract with the plaintiff, but deny the legal effect of the same, as claimed by the plaintiff, and set forth in their [257] answer a copy of the contract, which is as follows:

“AGREEMENT.

This instrument, made this 11th day of March, 1918, by and between John Tuppela of Astoria, Oregon, party of the first part, and Enoch E. Mathison, of Astoria, Oregon, party of the second part, WITNESSETH:

That whereas the party of the first part claims to have interest in several of the mining claims situated at Chichagof in the Sitka precinct in the Territory of Alaska, more particularly described and named as follows, to wit: Over the Hill lode mining claim, Pacific lode mining claim, Golden West lode mining claim, Rising Sun lode mining claim, and the Porphyry lode mining claim, all at Chichagof, in the Sitka Precinct of the Territory of Alaska aforesaid; and

Whereas, the party of the first part has other interests in other properties at or near Sitka, Alaska,

Whereas, title and interest of the party of the first part to the property or properties aforesaid, is in dispute, and

Whereas, the party of the second part is an attorney at law, duly licensed to practice, and

Whereas, the party of the first part has engaged, retained and employed the party of the second part to act for him in his stead in all legal matters pertaining to the prosecution of the claims of the party of the first part, in and to the property described above, and to represent him in the courts of law and equity, and in all other courts in which it may become necessary for the proper prosecution of

said claims, and for the complete settlement and adjustment arising out of said claims, or actions instituted thereof.

Now, therefore, the party of the first part, in consideration of the services to be rendered by the party of the second part, does hereby promise and agree that the party of the second part may receive and recover one-half of the interests in said properties hereinbefore described, or one-half of the net proceeds from the sale of same, or if any damages be recovered from any of the parties claiming interest in said properties, then and in that case, the party of the first part agrees and promises to pay one-half of the proceeds collected of said damages.

It is further understood and agreed by and between the parties hereto that the party of the second part may associate any other attorney or attorneys with him as associate counsel in all matters herein, and the party of the second part, in consideration of the payments to be made as hereinbefore set forth, promises and agrees to represent the party of the first part in all matters pertaining to his right or rights in the properties aforesaid, and to prosecute any action or suit growing out of same, and in all courts, as in his judgment shall deem best and proper, for the successful consummation of said litigations or claims, and the party of the second part, as attorney for the party of the [258] first part, is hereby authorized and directed to collect any moneys that may be recovered from said interests or action, and to account to the party

of the first part in accordance with the terms of this agreement.

In witness whereof, the parties hereto have hereunto set their hands and seals in duplicate, this 11th day of March, 1918.

JOHN TUPPELA,

Party of the First Part.

ENOCH E. MATHISON,

Party of the Second Part.

Signed and sealed in the presence of

LAURI MOILANEN.

J. J. BARRETT.

State of Oregon,

County of Clatsop,—ss.

Be it remembered that on this 11th day of March, 1918, before me, the undersigned, a notary public, in *and said* County and State, personally appeared the within named John Tuppela and Enoch E. Mathison, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned.

In testimony whereof, I have hereunto set my hand and notarial seal, the day and year last above written.

J. J. BARRETT,

Notary Public for Oregon."

But the defendants deny the legal effect of said contract as pleaded by the plaintiff in said paragraph IV. By paragraph V of his complaint, it

is alleged by plaintiff that in pursuance of the terms of the contract aforesaid, plaintiff faithfully and diligently performed each and all of the covenants contained therein and undertaken by the plaintiff and then sets forth that he, the said plaintiff, made a thorough investigation of the facts in respect to said claims and the law applicable thereto, and during the period of five months devoted a [259] large portion of his time to said matter under the terms of the contract, and that because of said contract, the plaintiff was bound to carry on the prosecution of said claims on behalf of defendant and was thereby prevented from acting as attorney for any other parties in the matter of said prosecution; and that because the plaintiff was a party to said contract, he was compelled to neglect and did actually neglect other business during said period and was prevented from devoting his time to the prosecution of other business, and was compelled to remain at his office during said period of time, holding himself in readiness at all times to carry on the prosecution called for in said contract.

These allegations of paragraph V are denied *in toto* by the defendants in their answer and these constitute one of the issues of this action.

In the sixth paragraph of the second cause of action in plaintiff's complaint, it is alleged that on or about the — day of September, 1918, the defendant, without just or legal cause, and without sufficient reason therefor, breached said contract and discharged plaintiff from further control or participation in the prosecution of said claims and

in violation of the terms of said contract. That plaintiff had at all times diligently and faithfully carried out the work under said contract engaged to be performed by him, and that plaintiff was at all times ready, able and willing to proceed with the prosecution of said claims and to fulfill his covenants under said contract, and offered said defendant his services under said contract, but that defendant refused said services and without legal or sufficient cause for said refusal, discharged the plaintiff, and thereby rendered the performance of said contract on the part of plaintiff, according to the terms thereof [260] impossible.

Each and all of these allegations so set forth in paragraph VI are denied by the defendants in their answer and these are among the issues in the case.

By the seventh paragraph of the second cause of action of plaintiff's complaint, it is alleged that defendant on or about said — day of September, 1918, in violation of said contract, engaged, employed and retained other attorneys and proceeded with the prosecution of his said claim to the properties described in paragraph IV mentioned in said contract, and, as a result of said action on the part of the defendant, a judgment and decree was thereafter entered in the United States Circuit Court of Appeals for the Ninth Circuit, on or about the 20th day of July, 1920, in favor of the defendant John Tuppela and against the Chichagof Mining Company, whereby said defendant recovered one-half interest in the Over-the-Hill and Pacific lode mining claims, together with the whole of the Rising Sun

lode mining claim and all ores extracted from the said mining claims by the Chichagof Mining Company and for a judgment in favor of the said Tuppela according to his interest in said property and according to the value of the ores extracted therefrom after deducting the cost of mining and extracting the same; and also for the costs of the said action.

To this allegation of paragraph VII the defendants answered, denying that in September, 1918, in violation of the covenants of the contract alleged by plaintiff, or otherwise, the defendant Tuppela engaged, employed and retained other attorneys and proceeded with the prosecution of his claim to the property described in paragraph IV of the complaint, but they [261] admit the decree of the United States Circuit Court of Appeals for the Ninth Circuit, as alleged, denying that the said decree was the result of any action taken by the defendant Tuppela in the month of September, 1918.

By the eighth paragraph of the second cause of action of the complaint, the plaintiff sets forth that pursuant to a decree, a settlement was had between the defendant Tuppela and the Chichagof Mining Company, under the terms of which it was stipulated between the respective parties that the mining properties aforesaid were worth \$1,200,000, and plaintiff alleges that those mining properties aforesaid were worth not less than said sum, and the said Tuppela should receive \$300,000 cash as his share of the earnings therefrom, and his costs of legal procedure; and that in accordance with the terms

of said settlement, Tuppela received one-half interest in the Over-the-Hill, the Pacific lode mining claims, and the whole of the Rising Sun lode mining claim, and received \$300,000 in cash and the costs of the legal proceedings aforesaid.

Answering said paragraph, the defendants admit that a settlement was had, but deny the terms thereof, as alleged by the plaintiff in said paragraph, but state that the correct terms of the settlement were that John Tuppela procured a decree for an undivided one-half interest in the Over-the-Hill and an undivided one-half interest in the Pacific lode mining claims and the whole of the Rising Sun lode mining claim and also a decree for an accounting of the ores mined and milled from said claim by the said Chichagoff Mining Company, and that a settlement was had in the matter of the accounting, and that said Tuppela received, as his share, after paying his part of the expenses of said action, the sum of \$114,250, and an undivided [262] one-fourth interest in the Over-the-Hill and the Pacific lode mining claims, and an undivided one-half interest in the Rising Sun lode mining claim.

The only issue in paragraph VII is whether defendant violated his contract by employing other attorneys, and in paragraph VIII, as to the terms of the settlement.

Paragraph IX of the said cause of action sets forth that the mining claims mentioned in said decree were the same referred to in the contract of employment entered into on March 11, 1918, be-

tween plaintiff and said Tuppela, and that the defendants' rights in said claims were capable of being enforced at the time of the execution of said contract and moneys due defendant were collectible. These allegations of this paragraph are not denied in defendants' answer and must be taken as true.

By paragraph X of the second cause of action of the complaint, the plaintiff alleges that the services rendered by plaintiff to the defendant were of great value to the defendant and that the contract entered into on the 11th day of March, 1918, by and between the plaintiff and the defendant was a contract of great value to the defendant and that the breach of the said contract by the defendant as set forth therein caused great damage to the plaintiff, which he alleges to be the sum of \$450,000, and that but for said breach of said contract, plaintiff would have successfully prosecuted said claims and would have earned, received and realized from said contract the sum of \$450,000; but that through the breach of said contract, the plaintiff was deprived wholly of said sum which he otherwise would have earned and received, and that he has received nothing from the terms of said contract.

Answering to this allegation, the defendants deny that the plaintiff rendered any services to the defendant, John Tuppela, [263] and deny that the services claimed to have been rendered were of any value whatever to the defendant. They further deny that the contract of March 11, 1918, between the plaintiff and defendant was a contract of great or any value to the plaintiff, and deny that the

plaintiff has suffered any damages whatever by breach of the contract on the part of John Tuppela, and deny that there was any breach. They further deny that the plaintiff would have successfully prosecuted said mining claims, and would have received or realized the sum of \$450,000 or any sum whatever. They further deny that through the breach of said contract, the plaintiff has been deprived of the sum of \$450,000, or any sum whatever.

Therefore, the allegations set forth in paragraph X of the second cause of action are all denied by the defendant and constitute one of the issues of fact to be decided by you in this action.

In the third cause of action plaintiff alleges that between the 11th day of March, 1918, and the 30th day of August, 1918, at the special instance and request of John Tuppela, plaintiff advanced and loaned to the defendant certain sums of money aggregating \$362.50, an itemized statement of which is attached to the complaint and marked Exhibit "A." He further alleges in paragraph V of said third cause of action that defendant promised to repay plaintiff the said sum within a reasonable time thereafter, but has neglected, failed and refused to pay any part thereof, and that there is due plaintiff thereby the sum of \$362.50—to all of which the defendants state they have no knowledge or information sufficient to form a belief, and therefore deny.

The defendants also set forth five affirmative defenses, to which I will call your attention. [264]

The first affirmative defense is that plaintiff was

not at the time of the execution of the contract referred to in the complaint and is not now and never has been, qualified and capable of performing on his part the duties and professional services undertaken by him in this: that it was the duty of the plaintiff, under the said contract, and it was the contemplation of the parties, that plaintiff should bring an action on the part of John Tuppela against the Chichagoff Mining Company, and that such suit could only be brought in the District of Alaska, and that plaintiff was not at the time of the execution of said contract, is not now and never has been, admitted to practice in the courts of Alaska.

For a second affirmative defense, the defendants allege that if it be true, as claimed by plaintiff, that the defendant Tuppela did discharge plaintiff as his attorney, that such discharge was justifiable in that plaintiff by his gross negligence failed, neglected and refused to bring the suit contemplated in the said contract for more than one year after the contract of employment, or to come to Alaska to investigate the rights of said Tuppela, or, in fact, to take any steps on behalf of said Tuppela.

For a third affirmative answer to the matters set forth in the complaint, the defendants allege that the plaintiff ought not to maintain this action for the reason that the contract mentioned in plaintiff's complaint was obtained by plaintiff's fraud and imposition, practiced upon the defendant John Tuppela in that the said Tuppela, having been adjudged insane, was discharged from the Morningside Insane Asylum on December 17, 1917, and that some

time about March 1, 1918, he met the plaintiff at Astoria, Oregon; that plaintiff held himself out as an attorney-at-law; [265] that said Tuppela was an ignorant miner and prospector, unable to read or write the English language and was at said time in bad health mentally and physically and in destitute circumstances; that Tuppela at said time was desirous of finding an attorney who could and would undertake to provide the moneys to meet the necessary expenses of bringing and prosecuting the suit in his behalf against the Chichagoff Mining Company to recover his mining claims, and who could and would prosecute said suit to final judgment in consideration of a moiety after fruits of such litigation, the said Tuppela having no other means of procuring said moneys and legal services; that Tuppela fully acquainted the plaintiff with his condition and all facts concerning his rights to said property, and plaintiff then and there agreed on his part to bring such action for Tuppela and prosecute the same to final judgment with reasonable skill and diligence, and to furnish all moneys necessary for the expenses of the litigation and the support of Tuppela during such litigation in consideration of an undivided one-half interest in such property, in the event the plaintiff should succeed in recovering the same for said Tuppela; and after said agreement and understanding between the plaintiff and Tuppela had been reached, plaintiff, as Tuppela's attorney, undertook to reduce the same to writing for execution on the part of both Tuppela and himself, but in so doing, plaintiff intentionally and

fraudulently omitted from said writing the obligation on his part to furnish such money and to bring such suit with reasonable skill and diligence, but falsely represented to said Tuppela that the contract as drawn by plaintiff correctly embodied their agreement as aforesaid, and the said Tuppela, being unable to read and relying upon the representations of the plaintiff, signed the same, believing [266] it to contain the stipulations and undertakings of the plaintiff aforesaid.

And for a fourth affirmative defense, the defendants allege that after the employment of the plaintiff by the defendant Tuppela on March 11, 1918, it became and was the duty of the plaintiff to bring and prosecute such action with reasonable skill and diligence; that plaintiff knew or should have known that delay in bringing said action and promptly assisting the rights of Tuppela greatly endangered his interest and the rights involved; but that plaintiff wilfully and negligently failed to institute such suit or take any steps whatever under said employment for the period of more than one year; that the said Tuppela waited upon the plaintiff for more than one year, repeatedly requesting him to bring said action, and that the said plaintiff, failing to do anything, but having wholly abandoned his employment, the said Tuppela, on or about May 2, 1919, employed other counsel to perform such services on substantially the same terms as he had employed plaintiff; that plaintiff knew of such employment and knew that such employment was had under the belief on the part of Tuppela that plaintiff had

abandoned his connection with the case, and so knowing, made no objection thereto and did not aid or offer to aid in any way in the prosecution of said suit, but acquiesced in the changes made in the situation and obligations by Tuppela, intending thereby to escape all the obligations and risks of said employment, and, in the event of the final recovery of said property by other counsel employed by Tuppela, to assert a claim under the said contract of March 11, 1918; and that if plaintiff had not in fact abandoned his said employment he could and would have aided and taken part in the prosecution of said suit and shared in the [267] burdens and risks as well as in the benefits derived therefrom, and that by such conduct he misled the said Tuppela, inducing him to employ other counsel and pay them full value for professional services in said action.

And for a fifth affirmative defense the defendants plead that plaintiff ought not to maintain the said suit for the reason that if plaintiff did not wholly abandon said contract of employment alleged by him prior to the time of the employment of other counsel, he was guilty of negligence which justified the said Tuppela in discharging him. That plaintiff knew, or by the use of ordinary skill and diligence should have known that delay in bringing said action or suit and in the prompt assertion of the claim of Tuppela to said property would greatly endanger the rights of the said Tuppela thereto by laying the foundation for a plea of laches by the said Chichagoff Mining Company.

And for a further affirmative defense to the third cause of action set out in plaintiff's complaint, which is the cause of action for moneys loaned defendant Tuppela, defendant alleges that if plaintiff did advance any moneys as stated in said cause of action, he made such advances under his contract with Tuppela, which said moneys were only to be repaid on the successful termination of a suit to be brought and prosecuted by the plaintiff and that the moneys so advanced to and expended by Tuppela, if any, were of no benefit whatever to the said Tuppela.

To the affirmative matters set forth in the answer of defendants, the plaintiff, in his reply, denies that the defendant Tuppela received as his share, under the accounting in the settlement with the Chichagoff Mining Company only \$114,250 and an undivided one-fourth interest in the Over-the-Hill and the [268] Pacific lode claims, and an undivided one-half interest in the Rising Sun lode claim, but alleges that the said Tuppela received, under said accounting, the sum of \$300,000 and an undivided one-half interest in the Over-the-Hill and Pacific lode claims and the whole of the Rising Sun lode mining claim.

In reply to the first affirmative defense contained in the second amended answer—which is the defense by defendant that plaintiff was not a duly qualified attorney, capable of performing the duties in the contract—plaintiff admits that he has never been admitted to practice in the courts of the Territory of Alaska, and he further admits that it was within the contemplation of Tuppela and plaintiff to prose-

cute to final determination, by action, legal or otherwise, the claims of said Tuppela against the Chichagoff Mining Company; but denies every other allegation contained in said first affirmative answer and defense.

Replying to the second affirmative defense, the plaintiff denies each and every allegation contained therein.

Replying to the third affirmative defense contained in the second amended answer the plaintiff denies each and every allegation thereof, except that plaintiff admits that Tuppela became insane on or about the year 1914 and was sent to Morningside Asylum for treatment and was discharged therefrom on or about December 17, 1917; and that plaintiff is and held himself out as an attorney at law for many years and long prior to 1918; and that after said Tuppela's discharge from said asylum, he was desirous of finding an attorney to bring suit on his behalf to recover certain mining claims and other property from the Chichagoff Mining Company, and that on or about March 11, 1918, plaintiff and Tuppela entered into a contract, a copy of [269] which is attached to said amended answer.

Plaintiff denies, in his reply, the affirmative matter contained in the fourth affirmative defense, the fifth affirmative defense of defendant's answer, and also the affirmative defense as to money loaned, alleged in the third cause of action of the complaint.

These several affirmative statements and the denials thereof, constitute the issues of fact in this case as disclosed by the pleadings. Of these issues,

the question which first arises under the pleadings is the capacity or capability of the plaintiff to perform the conditions of the contract of March 11, 1918.

It is admitted by the plaintiff, in his reply, that he has not been admitted to practice as an attorney at law in the courts of the Territory of Alaska, but it is alleged that he is an attorney and was at all times mentioned in the complaint an attorney authorized to practice in the courts of the State of Oregon where the contract appears to have been made.

I instruct you, as a matter of law, that the courts of the Territory of Alaska, wherein the real property mentioned in plaintiff's complaint and described in the contract is situated, have the sole jurisdiction of an action to recover the mining property therein mentioned; and if the plaintiff was not authorized to practice the profession of attorney at law in the Territory of Alaska at the time of entering into such contract, he would not be qualified to perform the professional services required by said contract, and if that were so, without any other stipulation being entered into in said contract, it would be a defense to said action.

But if you further find from the evidence that the defendant [270] Tuppela, who entered into the said contract of employment with the plaintiff, was informed of such act of plaintiff not being authorized to practice in Alaska at the time of entering into the said contract, and that such contingency, with the knowledge and consent of the said Tuppela

was provided for in said contract, by authorizing the plaintiff to associate competent counsel, authorized to prosecute the contemplated proceedings, suits or actions with the plaintiff, and without expense to defendant Tuppela, then the fact that the plaintiff was not authorized to practice law in the Territory of Alaska would be no defense in this action, and if you so find you will not further consider said defense.

The second issue raised on said contract is that the defendant fraudulently, purposely and intentionally omitted from said contract certain stipulations which were agreed upon by the plaintiff and the defendant as a part of said contract, namely, that plaintiff, in reducing said contract to writing, intentionally and fraudulently omitted from such writing the obligation on his part to furnish the moneys necessary for the prosecution of any action that might be required and to bring and prosecute said suit or action with reasonable skill and diligence.

I instruct you that it is admitted by the pleadings that the contract of March 11, 1918, between the plaintiff and the defendant Tuppela was entered into between said parties on said date, and under the foregoing allegation in the answer, a question arises whether said contract was fairly and properly entered into between the parties and whether the same fully expressed their understanding as to the nature of the employment, and that the same was fully understood by the defendant [271] in said action; and that no concealment prejudicial to the

defendant in entering into such contract as to any of the facts in relation to plaintiff's obligation was had by the plaintiff to the detriment of the defendant.

I instruct you that under the law of this Territory, the measure or mode of compensation of attorneys is left to the agreement expressed or implied by the parties, and that if a contract is entered into between an attorney and a client providing for the amount and manner of the compensation of the attorney for his services in a professional capacity, such contract will control and be binding on the parties; provided, however, that such contract was fair, reasonable and fully comprehended by the client and that no fraudulent representations or concealments were made by the attorney before or at the time of entering into the contract.

If you find from the evidence in this case that the written contract of March 11, 1918, was fair and reasonable under the circumstances of the case and fully comprehended by the defendant Tuppela, and expressed the terms of the understanding between the plaintiff and the defendant, then said contract as to its terms, must be upheld.

If, however, you find from the evidence that the plaintiff omitted from the written contract any obligation on his part to be performed, as set forth in defendant's affirmative defense, the plaintiff cannot recover in this action, and your verdict should then be for the defendants.

I instruct you that in every contract between an attorney and client, it is implied that there shall be

the utmost good faith and confidence in their mutual transactions, and it is further implied that the client will inform his attorney as to [272] all matters relating to the subject of the litigation within his knowledge and that the attorney will, on his part, use ordinary diligence, dispatch and skill in the prosecution of the claims or interests entrusted to him. By "ordinary diligence, dispatch and skill" is meant such as under the circumstances of the case would ordinarily be used by reputable members of the profession.

If, therefore, you should find from the evidence that the plaintiff used reasonable diligence, skill, care and dispatch in the preparation and prosecution of such matters as were committed to his care by the defendant Tuppela, and that he was under the terms of the contract and understanding between the plaintiff and the defendant competent and authorized to act in that behalf, and that he was, without justifiable cause, prevented by the defendant from carrying out his contract, then it is your duty to find for the plaintiff.

On the other hand, if you should find from the evidence that the plaintiff did not, with ordinary dispatch, diligence, care and skill, proceed with the matters entrusted to him in the performance of his contract, and thereby the defendant, Tuppela, had reasonable cause to believe that he, the said plaintiff, had abandoned his contract, the plaintiff cannot recover on the second cause of action.

I instruct you in this connection the plaintiff is not suing the defendant for the value of the services

performed by him under the contract, but is suing for damages for the alleged breach of the contract of employment of March 11, 1918, by the defendant in that he alleges the defendant discharged him and thus rendered it impossible for him to perform the contract, and thereby he, the plaintiff, suffered damages in the sum of [273] \$450,000.

I instruct you that in every contract of employment between attorney and client, even though such contract provides that the compensation of the attorney shall be contingent upon the successful prosecution of the suit committed to the attorney, there is applied the authority to discharge the attorney, even though without cause or justification; and if such discharge is given without justifiable cause, the client is liable to the attorney for all damages which the attorney may sustain through the breach of the contract. On the other hand, if the attorney, without cause, abandons his contract of employment, he cannot recover anything.

If the fault lies with both parties, the attorney may recover only the reasonable value of the services that have been performed by him; but as this, the second cause of action is not for the value of the services performed, but for damages for wrongful discharge, if you find both parties were in fault, the plaintiff can recover nothing thereon.

I instruct you that under the contract, the employing by the defendant Tuppela of other attorneys to prosecute the action to enforce his rights against the Chichagoff Mining Company by itself cannot be considered as a discharge, or breach of his con-

tract unless such employment of other attorneys was made over the objection or protest of the plaintiff; or the defendant's actions or neglect were such as to lead the plaintiff, under the circumstances, to believe that he was discharged.

If, from the evidence, you find that the contract of March 11, 1918, was fairly and understandingly entered into between the parties thereto, without concealment or fraud, and that the plaintiff did not abandon said contract, but that the defendant, without just cause, discharged the plaintiff from his [274] employment under said contract and thereby breached the same; and further find that the plaintiff was at all times competent and willing to perform the conditions and obligations of his contract and made reasonable efforts so to do, then it would be your duty to find for the plaintiff and to assess his damages under the contract.

I further instruct you that in this case, the contract provides that plaintiff shall receive for his compensation for the successful prosecution of the rightful claims of defendant, one-half of what may be recovered. Therefore, the measure of damages of plaintiff, should you find for plaintiff, is the amount of money he would have received had he, the plaintiff, been allowed to complete the performance of his contract, less the value of such services as he would have been required to perform under his contract, and also deducting such expenses as he would have been compelled to incur in carrying out his contract.

In determining this amount, you may consider,

together with the amount of money plaintiff would have received, had he been allowed to complete his contract—

1. The professional capacity or capability of plaintiff to prosecute said action under the contract.

2. The amount of work he performed, as compared with the amount required to complete the contract.

3. The amount which he would have been required to perform under the contract to carry it to a successful conclusion, and,

4. The expenses incident to the completion of the contract that would likely have been incurred by him, and award the plaintiff such damages as you justly think he is entitled to. [275]

As to the third cause of action, which is for money loaned, I instruct you that if you find from the evidence that the amounts set forth under this cause of action, were loaned to the defendant by the plaintiff, as alleged in the complaint, then you should find for the plaintiff in the sum of \$362.50, with interest at the rate of six per cent per annum from October 18, 1921.

The burden is on the plaintiff to prove the sums loaned for the reason that the defendants deny the loans.

Defendants further set forth in their affirmative answer that if any money was advanced to Tuppela, as alleged, it was advanced under the contract of March 11, 1918, and was to be repaid only upon the successful prosecution of an action to be brought

by plaintiff under the said contract, and that plaintiff neglected to prosecute the said action.

I instruct you that you should not consider this defense unless you shall have found, from the evidence, that the plaintiff and defendant contracted that plaintiff was to advance moneys for the prosecution of the proposed suit or action, and that the plaintiff fraudulently omitted such stipulations or obligation from the written contract of March 11, 1918.

If you shall have so found by a preponderance of the evidence, that such stipulation or obligation was so omitted from the contract of March 11, 1918, then you should consider whether or not such moneys were advanced pursuant to the terms of such stipulation; and if you find the moneys were so advanced under such omitted stipulation, then the plaintiff should not recover.

But if you find from the evidence that the plaintiff did lend defendant said moneys, or any part thereof, and did not [276] advance them under a stipulation fraudulently omitted from the contract, then your verdict should be for the plaintiff for such sums as you shall have found plaintiff loaned to defendant.

I instruct you that in this case the two main questions are, first, whether or not the plaintiff was discharged by the defendant, or whether he abandoned his contract of employment; and, second, if you find that the plaintiff was discharged, whether or not such discharge was wrongful and without sufficient cause.

I instruct you that mere neglect or inattention of the client to the matters entrusted by him to the attorney will not of itself operate as a discharge of the attorney from his employment or justify the attorney in treating it as a discharge. Such neglect, inattention or failure to co-operate with or aid his attorney, to constitute a discharge of the attorney from his employment, must be attended by such other acts, conduct or conditions as would lead an ordinary person reasonably to believe that such conduct and actions were intended as a discharge; and, in determining whether or not the defendant Tuppela's conduct was sufficient to lead the plaintiff reasonably to believe that he was discharged, you may take into consideration all his, Tuppela's, acts, both of omission and commission, from the date of his contract up to and including that of his employment of such other attorneys; also the fact of his employment of other attorneys, his mental condition and all other facts and circumstances bearing on that issue, shown by the evidence; and from such facts, circumstances and conditions determine whether the plaintiff was, as a reasonable man, justified in believing himself discharged by the plaintiff from the employment contracted for. [277]

If such facts, circumstances and conditions were such as would warrant a man of ordinary intelligence and prudence in believing that it was the intention of the defendant to discharge plaintiff from his employment, then your duty would be to find that the defendant discharged plaintiff.

On the other hand, if the defendant Tuppela's

conduct was such as would not warrant a man of ordinary intelligence and prudence in believing that he, Tuppela, intended to discharge plaintiff from his employment under the contract, then plaintiff was never discharged, and if plaintiff, without just cause or reason, treated the contract as rescinded by the defendant Tuppela, he, the plaintiff, cannot recover on his second cause of action.

And as to the question of discharge of the plaintiff, the burden of proving the same and that the discharge was without sufficient cause or wrongful is upon the plaintiff.

If you find from the evidence that the plaintiff was discharged by the defendant Tuppela, then under the instructions heretofore given you, it will be your duty to inquire whether such discharge was wrongful.

In deciding this question, you will consider that it is implied in every contract of the employment of an attorney that he will exercise ordinary skill, care, prudence and dispatch in attending to his client's business; that is to say, the degree of skill, care, prudence and dispatch which a reputable lawyer would exercise under the same or similar conditions.

If he fails in this regard, I charge you that the client is justified in discharging him and the attorney cannot recover.

The rule, as applied to the evidence in this case simply means, was there uncalled-for delay by plaintiff in failing to prosecute the matters committed to him by the defendant Tuppela [278]

prior to the time plaintiff was discharged by the defendant Tuppela, if you shall find he was discharged?

By "uncalled-for delay" is meant such delay as a reputable lawyer, of ordinary prudence and skill, would not be guilty of, under the same or similar conditions.

In determining this question, you are to take into consideration the contract between the parties; the understanding between the parties to the contract after the contract was entered into as to their mutual duties with reference to the contract, their conduct in relation to the understanding; the probabilities or lack of probabilities of delay prejudicing defendant's rights, the conditions surrounding the parties and all other facts and circumstances bearing upon the question; and if it has been shown to you by a preponderance of the evidence that the discharge was wrongful, your verdict should be for the plaintiff on the second cause of action. If it was not wrongful, but justified under the circumstances and conditions shown in the evidence, your verdict should be for the defendant.

I instruct you that if you find from the evidence that the plaintiff failed to use ordinary and reasonable diligence and dispatch in carrying out the obligations of his contract with the defendant by him to be performed under the circumstances and conditions shown by the testimony, and because thereof the defendant was reasonably led to believe that plaintiff had abandoned said contract and by reason of such reasonable belief, the defendant em-

ployed other counsel, and such other counsel brought an action against the Chichagoff Mining Company; and that plaintiff, during the pendency of such action so brought by other counsel, was informed thereof, or by reasonable diligence could have been informed thereof; and that plaintiff failed or [279] neglected to object to such employment of other counsel, and failed and neglected to aid or offer aid or assistance to such other counsel in the prosecution of the action, intending thereby to avoid the burdens and responsibilities of the prosecution and to receive the benefits derived therefrom, the plaintiff, under such conditions would not be entitled to recover on his second cause of action.

I further instruct you that you, as the jury, are the sole judges of the effect and value of the evidence addressed to you. Your power of judging the effect of evidence is not, however, arbitrary, but to be exercised by you with legal discretion and in subordination to the rules of evidence.

You are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

If you find a witness wilfully false in one part of his testimony, you may distrust him in others.

This being a civil case, the affirmative of the issue must be proved; that is to say, the affirmative of every issue, either in the complaint, answer or reply; and when the evidence is contradictory, the findings shall be according to the preponderance of

evidence. You are further instructed that evidence is to be established, not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to produce and of the other to contradict.

I instruct you further that it is admitted that John Tuppela was, in July, 1921, adjudged insane and the fact that his testimony has not been produced before you is not to be taken as a circumstance, or lead you to any inference against defendants [280] because of such nonproduction.

From the evidence it appears that from December 17, 1917, to June, 1921, he was sane, and you have a right to consider his conduct and actions during this period, as well as the conduct and actions of the plaintiff, in arriving at your conclusions under the evidence and the instructions I have given you.

I again call your attention to the issues in the case and the several elements involved at the risk of repeating the foregoing instructions.

1. The contract between the plaintiff and John Tuppela is admitted to have been made. If such contract was understandingly and fairly entered into between the plaintiff and the defendant Tuppela, and the plaintiff did not abandon his employment under such contract and was wrongfully discharged or prevented from carrying it out by Tuppela, he is entitled to recover his damages for the breach of said contract.

2. If plaintiff abandoned the employment under

said contract, he cannot recover anything in this action for damages for breach of that contract.

3. If plaintiff failed to exercise ordinary and reasonable skill, care, diligence and dispatch in beginning and prosecuting the suit under the contract, or in fulfilling the terms of the contract in any way, and because thereof Tuppela employed other counsel; and plaintiff failed and neglected to object to such employment or to aid or offer to aid such other counsel, thereby intending to avoid the burdens but enjoy the fruits of the action by other counsel, he cannot recover anything for damages under the allegations of this complaint.

4. If the plaintiff, through the fault of both the plaintiff and the defendant, was prevented from carrying out the terms of the contract or prevented from prosecuting the action or [281] *or* rights of defendant against the Chichagoff Mining Company, then the plaintiff cannot recover anything in this action.

5. The plaintiff is entitled to recover the money, if any he advanced to Tuppela, if such money was loaned to Tuppela for his, Tuppela's, use and benefit or at his request.

I instruct you that, if you find from the evidence, that the plaintiff was duly admitted to practice as an attorney at law in the courts of the State of Oregon, the presumption of law is that he is a capable and efficient attorney, and the further presumption follows that he, the plaintiff, if he was not prevented by his discharge by defendant Tuppela from prosecuting the action against the Chichagoff

Mining Co. by the act of defendant; provided that you find he was prevented by the action of the defendant, the presumption, under the law, is that he would have been successful in such action, either by his own efforts or by the efforts of other attorney whom he might have, under said contract, associated with him.

I instruct you that certain testimony of J. H. Cobb, with reference to the plea of laches on the part of Tuppela, interposed by the Chichagoff Mining Co. in the action of Tuppela vs. the Chichagoff Mining Co., and the ruling of the Circuit Court of Appeals thereon, which was admitted in evidence, was stricken out on motion of the plaintiff during your absence from the courtroom. You are, therefore, not to consider the evidence of Mr. Cobb on that point.

You are instructed that where the relationship of attorney and client exists, it is the duty of the client to, and there is an implied agreement and promise on the part of the client that he, the client, will, procure and furnish to his attorney any [282] and all documents, muniments of title, names of witnesses, addresses of witnesses, and other evidence within his possession or control, necessary or material to the attorney to prepare for, or to substantiate or to prosecute the client's claims.

If you find from the evidence that it was agreed between the plaintiff and defendant that the defendant Tuppela should proceed from Astoria to Alaska and procure certain papers and other evidence mutually deemed necessary for plaintiff to

prosecute Tuppela's claim against the Chichagoff Mining Company, then I instruct you that the plaintiff was entitled to rely upon such agreement or understanding for a reasonable time, without further effort or inquiry; provided you find from the evidence that Tuppela's mental condition was such that a reasonable man would be justified in relying on such promise under all the circumstances of the case, shown by the evidence and which had been brought to the knowledge of the plaintiff at the time the understanding or agreement was entered into.

You are instructed that it is a general rule of law, by which rule of law you are governed in this case, that fraud is never presumed but must be affirmatively proved; on the contrary, the presumption, if any, is in favor of innocence, and the burden falls on him who asserts fraud to establish it by proving every material element of the cause of action by a preponderance of evidence; and in this case you are instructed that the burden is on the defendants to prove that the plaintiff was guilty of any fraud in entering into the contract with the defendant Tuppela.

You are instructed that it is a general rule of law, by which rule you are governed in this case, that where an attorney and client have entered into a contract relative to the performance [283] of services by the attorney on behalf of the client, which is fair on its face, the burden is upon the client to show, if he claims such to be the case, that the attorney committed fraud in entering into such contract with the client; and in this case you are

instructed that the burden is upon the defendants to show that the plaintiff committed fraud in entering into said contract that was entered into by and between him and the defendant Tuppela and that, unless you find that the defendants have sustained said burden by a fair preponderance of the evidence, you should not find that the plaintiff committed any fraud in the entering into of said contract.

You are instructed that it is a general rule of law, by which rule you are governed in this case, that where an attorney and client have entered into a contract relative to the performance of services by the attorney on behalf of the client, the burden is upon the client to show, if he claims such to be the case, that the attorney has been guilty of either negligence or laches in the prosecution of such services as were contemplated under such contract; and in this case you are instructed that the burden is upon the defendants to show that the plaintiff was guilty of either negligence or laches in the prosecution of such services as you find, if any, were contemplated under the contract entered into by and between the plaintiff and the defendant Tuppela and that, unless you find that the defendants have sustained said burden by a fair preponderance of the evidence, you should not find that the plaintiff was guilty of either negligence or laches in the prosecution of said services.

You are instructed that it is a general rule of law, subject to the instructions which I have heretofore given you, that where an attorney and a

client have entered into a contract [284] relative to the performance of services by the attorney on behalf of the client, the burden is upon the client to show, if he claims such to be the case, that the attorney has abandoned the contract; and in this case you are instructed that the burden is upon the defendants to show that the plaintiff abandoned the contract entered into by and between him and the defendant Tuppela and that, unless you find that the defendants have sustained said burden by a fair preponderance of the evidence, you should not find that the plaintiff did abandon said contract.

You will be handed four forms of verdict:

1. That you, the jury, find for the plaintiff on his second cause of action and assess his damages in the sum of \$——; and that you, the jury, find for the plaintiff and against the defendant in the third cause of action, in the sum of \$——, with interest at the rate of six per cent per annum from October, 18, 1921.

2. That you, the jury, find for the defendant on the second cause of action, and that the plaintiff is not entitled to any damages by reason of the facts set forth in the second cause of action; and that you, the jury, further find for the defendant in the third cause of action.

3. That you, the jury, find for the defendant in the second cause of action and that the plaintiff is not entitled to damages by reason of the facts alleged therein; and that you, the jury, further find for the plaintiff in the third cause of action in the

sum of \$——, with interest at the rate of six per cent per annum from October 18, 1921.

4. That you, the jury, find for the plaintiff in the second cause of action and assess his damages in the sum of \$——; and that you, the jury, find for the defendant and against the [285] plaintiff in the third cause of action.

When you retire to your jury-room, after considering the case, you will, by your foreman, sign the verdict which you may have agreed upon and return the same into open court.

And thereupon, and before the jury retired, the plaintiffs, by their counsel, made the following exceptions:

We except to that portion of the charge in which the Court tells the jury that if Tuppela knew that he was not a member of the Alaska bar, then that would not be a defense; and we except to the refusal of the Court to give all of the instructions requested by the plaintiffs.

Sunday, November 12, 1922, 2:30 P. M.

Court convened at request of jury for further instruction.

Plaintiff and counsel for respective parties were present and waived the fact that it was Sunday, the absence of the Clerk of the Court and the calling of the roll of the jury. Whereupon the Court further instructed the jury as follows:

Gentlemen of the Jury:

You have asked me to instruct you on three questions. The first question is—

“If the jury find that there was laxity or fault on part of both parties to suit, for whom should the verdict be rendered on the second cause of the complaint?”

The second question is—

“If the jury finds that there was a laxity on both plaintiff and defendant in living up to the terms of the contract, but that the plaintiff had performed legal services, should the jury find damages for the plaintiff on the second cause of the complaint to the extent of the services performed?”

And the third question is—

“If the jury find that there was laxity or fault on the part of both parties to suit, but unequal in degree, how should a verdict be rendered on the second cause of the complaint.”

[286]

Taking the second question first, I instruct you that the second cause of action of the complaint is for damages alleged to have been suffered by the plaintiff because of the violation of the contract of March 11, 1918, by defendant Tuppela, in that he wrongfully discharged the plaintiff and prevented him, the plaintiff, from carrying out the terms of the contract and receiving the full compensation for services, as provided for in the contract. Plaintiff is not suing in this cause of action, for the value of the services performed by him under the contract. That would come in another action—on what is commonly called a *quantum meruit*, or an action for the value

of services rendered. The value of the services rendered by the plaintiff to the defendant is not an issue in this case and is not to be considered by you except, if you find for the plaintiff, in estimating the damages to plaintiff, the amount of work the defendant would have to perform to complete his contract is to be taken into consideration in connection with the value of the contract, as set forth in the contract. And if you find that the defendant has performed services, of course, the amount of the services performed by him may be considered by you, in connection with the amount of services which he would have to perform as a matter of deduction from such services that he would have to perform.

You are, therefore, not to take, as a measure of damages on this cause of action, the value of the services performed by the plaintiff. In this case, I instruct you that the measure of damages, if you find for plaintiff, is the amount of money which the plaintiff would have received had he, the plaintiff, been allowed to complete the performance of the contract, deducting, [287] however, therefrom, the value of the work, labor or services he would have been required to perform under his contract to complete the same; and also deducting therefrom such expenses as he would have been compelled to incur in carrying out his contract, if any are shown.

Answering the first question, this question is comprehended in the third question, and both may be answered as one. I instruct you that when the

relation of attorney and client exists, it is requisite that there should be mutually the utmost frankness, candor, trust and confidence between them, and where there arises between them distrust or lack of confidence reasonably to be inferred from the conduct of either, then the party responsible for the reasonable lack of confidence or distrust is the party at fault. For that reason, all the facts, circumstances and conditions concerning the relations of the parties to this action—that is, the defendant Tuppela and the plaintiff Mathison, were admitted in evidence for your determination whether the defendant Tuppela, without justification, or wrongfully, discharged plaintiff, or whether the plaintiff wrongfully abandoned the contract.

There is in this case no evidence of a formal dismissal of the plaintiff from the services of the defendant, and the question as to whether he was discharged must be inferred by the jury one way or the other from the circumstances surrounding the case and the actions of the parties. The plaintiff claims that he was discharged by the defendant Tuppela and bases his contention on the acts of the defendant Tuppela in connection with the case, which he says and which he insists, amount to a discharge. It, under these conditions, becomes your duty to determine, from the facts and circumstances and conditions produced in evidence, whether or not the acts of defendant Tuppela were such as would [288] lead a reasonable man, under the circumstances, to believe that he was discharged. If you find from the evidence that

they were such acts of the defendant Tuppela, as to lead a reasonable man to believe that he was discharged, then it would be your duty to find that he, the plaintiff, was discharged. If they were not, your duty would be to find that he was not discharged.

The second question arising, if you find that the plaintiff was discharged by the defendant, is, was the discharge wrongful or without sufficient cause? In the consideration of this question, you should consider whether or not the acts of the plaintiff were such as to cause a reasonable man, being a client, to lose confidence in the promptness, ability and fair dealing of his attorney. If they were, the discharge would not be wrongful or without sufficient cause. On the other hand, if such acts were not such as to make a reasonable man to lose confidence in the promptness, skill and ability of his attorney, and without such reasonable cause he discharged him, you should find that the attorney was wrongfully discharged.

The burden of proof is on the plaintiff to show the discharge, and first, that the same was wrongful and without sufficient cause. But, if you find from the evidence that the plaintiff was discharged and the defendant, as in this case, by affirmative allegations, seeks to justify the discharge, the burden shifts to the defendant to show the facts concerning such justification.

If, however, you find from the evidence that the actions of both parties were such as to lead to mutual distrust and lack of confidence in the other,

sufficient to authorize a discharge or abandonment, you should consider the primary cause or fault thereof—I say the primary cause or fault—and if such primary [289] cause or fault was in itself sufficient, either to justify the plaintiff in considering himself discharged or in justifying the defendant as a reasonable man under the circumstances in discharging him, you will so find. But if you find from the testimony that the primary cause was not sufficient in itself to warrant a reasonable man in believing that the obligations of the contract were rescinded by the other, then you will consider the further actions and conduct of the parties and determine from such further actions whether the defendant wrongfully discharged the plaintiff or whether the plaintiff was justified in considering himself discharged and abandoned further effort under the contract. If, however, you find from the evidence that the relations of the parties, through mutual fault, was such that there was an entire lack of confidence and trust between them and that both were equally responsible therefor and that such lack of confidence was such as to impair the relations of attorney and client, to the detriment of either of them, and that such arose from the continued fault of both parties, the plaintiff cannot recover in this action even though discharged. If the jury find, however, that both parties were responsible for the severance of the delicate relations of trust and confidence between the attorney and client, but that one of the parties is primarily and solely responsible therefor, or is, to an appreciable

extent, more responsible therefor than the other, then it would be the duty of the jury to find that the party so responsible is the party in fault and find accordingly.

Whereupon, before the jury retired, the defendants, by their counsel, excepted as follows:

Mr. COBB.—We except to the first instruction given in answer [290] to the question, and except to the second for the reason that there are not sufficient facts and circumstances in evidence in connection with Tuppela's conduct, or alleged conduct, in the fall of 1918, to justify the question of discharge going to the jury. [291]

Plaintiff's Exhibit No. 1.

Supreme Court of the State of Oregon.

To All Persons Unto Whom These Presents Shall
Come:

GREETING:

Be it known that as appears by the files and records of this Court

ENOCH E. MATHISON

was duly admitted and licensed as an attorney at law in all the Courts of this State on the 9th day of July, A. D. 1915.

IN TESTIMONY WHEREOF the Chief Justice of said Court hath hereunto set his hand and caused these presents to be attested by the seal of said Court at the City of Salem, this 9th day of July, in

the year of our Lord Nineteen Hundred and Fifteen.

FRANK A. MOORE,

Chief Justice of the Supreme Court of Oregon.

(Supreme Court Seal) Attest: J. C. MORELAND,

Clerk of said Court.

Plaintiff's Exhibit No. 1. Received in evidence
Nov. 8, 1922, in Cause No. 2115—A. John H. Dunn,
Clerk. By ————, Deputy.

Plaintiff's Exhibit No. 2.

UNITED STATES OF AMERICA,

DISTRICT OF OREGON.

BE IT REMEMBERED, That on the 22d day of November, A. D. 1915, the same being the 19th judicial day of the regular November Term of the District Court of the United States for the District of Oregon, at which was present and presiding the Hon. Chas. E. Wolverton, United States District Judge, for the District aforesaid, the following, among other proceedings, was had in said Court, that is to say: [292]

In the Matter of the Admission of ENOCH E. MATHISON to the Bar of this Court:

Now, at this day, comes C. J. Schnabel, Esq., an attorney of this Court, and moves that Enoch E. Mathison be admitted to the Bar of said Court; and it appearing that said applicant is duly qualified for such admission according to the rules of this Court:

IT IS ORDERED, that he be, and he hereby is, admitted to the Bar of this Court, to practice as an ATTORNEY AT LAW, SOLICITOR IN CHAN-

CERY, and PROCTOR IN ADMIRALTY; and thereupon the said applicant took the oath required and signed the rolls.

I, G. H. Marsh, Clerk of the District Court of the United States, for the District of Oregon, do hereby certify that the foregoing is a correct transcript from the journal entry of said Court in the matter of the admission of said Attorney.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at the City of Portland, in said district, this 22 day of November, in the year of our Lord, One Thousand, Nine Hundred and Fifteen, and of the Independence of the United States the One Hundred and Fortieth.

G. H. MARSH,
Clerk.

By F. L. Buck,
Deputy.

(Seal) 10-cent documentary stamp.

Plaintiff's Exhibit No. 2. Received in evidence Nov. 8, 1922, in Cause No. 2115—A. J. H. Dunn, Clerk.

Plaintiff's Exhibit No. 3.

AGREEMENT.

J. C. CLINTON,
Clerk of Circuit Court.

(Seal)

J. J. BARRETT.

THIS INSTRUMENT, Made this 11th day of March, 1918, by and [293] between John Tupela, of Astoria, Oregon, party of the first part, and

Enoch E. Mathison, of Astoria, Oregon, party of the second part, Witnesseth,

THAT WHEREAS, The party of the first part claims to have interest in several of the mining claims situated at Chichagoff in the Sitka precinct of the Territory of Alaska, more particularly described and named as follows, to wit: "Over-the-Hill" lode mining claim; "Pacific" lode mining claim; "Golden West" lode mining claim; "Rising Sun" lode mining claim; and the "Porphry" lode mining claim, all at Chichagoff in the Sitka precinct of the territory of Alaska, aforesaid, and

WHEREAS, the party of the first part has other interests in other properties at or near Sitka, Alaska, and

WHEREAS, title and interest of the party of the first part to the property or properties aforesaid, is in dispute, and

WHEREAS, the party of the second part is an attorney-at-law, duly licensed to practice, and

WHEREAS, the party of the first part has engaged, retained and employed the party of the second part to act for him and in his stead in all legal matters pertaining to the prosecution of the claims of the party of the first part, in and to the property described above, and to represent him in the Courts of law and equity, and in all other Courts in which it may be necessary for the proper prosecution of said claims, and for the complete settlement and adjustment arising out of said claims or actions instituted thereof,

NOW, THEREFORE, The party of the first part

in consideration of the services to be rendered by the party of the second part, does hereby promise and agree that the party of the second part may receive and recover one-half of the interests in said properties hereinbefore described, or one-half of the net proceeds from the [294] sale of same, or if any damages be recovered from any of the parties claiming interest in said properties, then and in that case the party of the first part agrees and promises to pay one-half of the proceeds collected of said damages.

It is further understood and agreed by and between the parties hereto that the party of the second part may associate any other attorney or attorneys with him as associate counsel in all matters herein, and the party of the second part in consideration of the payments to be made as hereinbefore set forth, promises and agrees to represent the party of the first part in all matters pertaining to his right or rights in the properties aforesaid, and to prosecute any action or suit growing out of same, and in all Courts as he in his judgment shall deem best and proper for the successful consummation of said litigation or claims, and the party of the second part, as attorney for the party of the first part, is hereby authorized and directed to collect any moneys that may be recovered from said interests or action, and to account to the party of the first part in accordance with the terms of this agreement.

IN WITNESS WHEREOF The parties hereto

have hereunto set their hands and seals in duplicate, this 11th day of March, 1918.

JOHN TUPPELA,

Party of the First Part.

ENOCH E. MATHISON,

Party of the Second Part.

Signed and sealed in the presence of

LAURI MOILANEN.

J. J. BARRETT. [295]

State of Oregon

County of Clatsop,—

BE IT REMEMBERED, That on this 11th day of March, 1918, before me the undersigned, a notary public, in and for said County and State, personally appeared the within named John Tuppela and Enoch E. Mathison, who are known to me to be the identical individuals described in and who executed the within instrument, and acknowledged to me that they executed the same freely and voluntarily, for the uses and purposes therein mentioned.

IN TESTIMONY WHEREOF, I have hereunto set my hand and notarial seal, the day and year last above written.

[Notarial Seal]

J. J. BARRETT,

Notary Public for Oregon.

Filed in the District Court, District of Alaska, First Division. July 8, 1922. J. H. Dunn, Clerk.

Plaintiff's Exhibit 1 for Identification.

Exhibit No. 3. Received in evidence November 8, 1922, in Cause No. 2115—A. J. H. Dunn, Clerk.

Plaintiff's Exhibit No. 14.

In the District Court for Alaska, Division Number
One, at Juneau.

No. 1841—A.

JOHN TUPPELA,

Plaintiff,

vs.

CHICHAGOFF MINING COMPANY, a Corpora-
tion,

Defendant.

**REPLY TO AMENDED ANSWER TO
AMENDED COMPLAINT.**

Now comes the plaintiff, by his attorneys, and for
reply to the amended answer of the defendant to
the plaintiff's amended complaint, alleges as fol-
lows:

Reply to the first affirmative defense. [296]

I.

Referring to the second paragraph of the first
affirmative defense, the plaintiff admits that the
"Pacific" and Golden West lode claims therein
mentioned were located by W. R. Hanlon on the
dates specified and that the Rising Sun was located
by the plaintiff on July 22, 1910; but it denies that
the Over-the-Hill claim was located by H. A. Bauer
and alleges in this connection that said claim was
located on March 26, 1906, by plaintiff, Charles
Peterson, W. R. Hanlon and H. A. Bauer.

II.

Referring to the fourth paragraph of said first affirmative defense, the plaintiff admits that on February 12, 1913, William R. Hanlon sold all his right, title and interest to the Pacific lode claim to the defendant, but he denies that the defendant, since said date or at any other time, has been or is the sole owner of the said Pacific lode claim or has been in the sole and undisturbed possession of the same, or of any other or greater interest than an undivided one-half interest.

III.

Referring to the fifth paragraph of the said first affirmative defense, the plaintiff denies that H. A. Bauer was on December 9, 1915, or at any other time the sole owner of the Over-the-Hill lode claim, and he further denies that on said December 9, 1915, the said H. A. Bauer owned any interest whatsoever in and to the said "Over-the-Hill" lode claim. Though it is true that on said date the said H. A. Bauer executed a quitclaim deed to the defendant to said claim, but he denies that the defendant, since said date, or at any other time, has been or is now sole owner of the said Over-the-Hill claim, or in the sole or undisturbed possession of the same. [297]

IV.

Referring to the sixth and seventh paragraphs of said defense plaintiff admits that prior to the 14th day of June, 1914, namely on the 4th day of

June, 1914, he was adjudged to be insane, but he denies all in singular the remaining allegations in said paragraphs contained.

REPLY TO THE SECOND AFFIRMATIVE DEFENSE.

I.

Plaintiff admits that he was adjudged to be insane on the 4th day of June, 1914, but he denies all in singular the further and remaining allegations in said second affirmative defense contained.

And for further reply to the affirmative answers of the defendant, plaintiff alleges:

I.

That it is true that the Pacific lode claim was located on October 24, 1907, in the name of William R. Hanlon, but prior to 1911 plaintiff had acquired from W. R. Hanlon an undivided half interest in the said claim that in the years, 1911, 1912 and to February 12, 1913, the said W. R. Hanlon and the plaintiff were in the joint possession and jointly claiming the said Pacific lode claim, and maintaining their right of possession thereto. That in the year 1912, the said W. R. Hanlon failed to perform his part of assessment work on said claim, but the same was performed by the plaintiff. That thereafter and prior to February, 1913, the plaintiff gave notice to the said W. R. Hanlon of the performance of said work, and that unless he contributed his part thereof, his interest in said claim

would be forfeited to the plaintiff as co-owner. That said W. R. Hanlon failed to contribute his part toward said assessment work and his interest would have become forfeited to plaintiff, but the [298] defendant, as successor in interest to W. R. Hanlon, in March, 1913, paid same to plaintiff.

II.

That the Over-the-Hill lode claim was located on March 26, 1906, by the plaintiff, W. R. Hanlon and one Charles Peterson who were on said date prospecting together under a grub-stake agreement with H. A. Bauer to jointly and equally share all locations made by either. That plaintiff, Charles Peterson and W. R. Hanlon jointly made a discovery upon the said Over-the-Hill and jointly marked the boundaries of the same and completed said location, but at the request of the said W. R. Hanlon, the location notice was posted in the name of H. A. Bauer, but with the distinct understanding and agreement that said claim should be owned and held by plaintiff, Hanlon, Peterson and the said Bauer, in the proportion of one-quarter each, which said agreement was ratified and approved by said Bauer; that thereafter, on January 10, 1907, the said Charles Peterson sold and conveyed his quarter interest to the said H. A. Bauer, who thereupon became the owner of the one-half thereof, but continued to hold the remaining one-half for the use and benefit and in trust for W. R. Hanlon and plaintiff; that plaintiff and the said Hanlon, for the years of 1909, 1910, and 1911 performed all the

assessment work upon said claim. The said Hanlon performing one-quarter thereof, the amount of his interest and plaintiff performing the remaining three-fourths thereof, the said Bauer failing and refusing to perform any of said assessment work or to contribute to the same. That in the year 1912, W. R. Hanlon and plaintiff duly and regularly gave notice to the said Bauer of the performance of said work, and that unless he paid his part thereof within ninety days his interest therein would be forfeited to his co-owners. [299] Said Bauer refused to pay, admitted and acquiesced in said forfeiture and abandoned all further claim to the said Over-the-Hill claim and during the years 1912, 1913, 1914, and 1915, failed and neglected to perform or offer to perform, or to pay or offer to pay any part of the assessment work on said claim, he well knowing during all of said time that his former interest was being claimed under the said forfeiture proceedings and that his successors in interest thereunder were on the faith thereof performing the assessment work necessary to hold and maintain said claim; and the said H. A. Bauer and the defendant, are now estopped to assert any claim to said premises adverse to the title obtained by plaintiff and W. R. Hanlon under said forfeiture proceedings.

III.

That on February 12, 1913, the said W. R. Hanlon quitclaimed to the defendant, an undivided half interest in and to the said Pacific, Over-the-Hill, Rising Sun and Golden West lode claims.

IV.

That thereafter, in the month of March, 1913, as soon as the plaintiff learned of said conveyance, he informed the defendant of all of the above facts and that the said Hanlon did not own an undivided half interest in and to the Over-the-Hill and never at any time owned such half interest and that he owned no interest in the Rising Sun, but because of the confusion and *undertainty* of the record title of some of the said claims, and to avoid litigation, it was then and there agreed between the plaintiff and defendant that the said Over-the-Hill, Pacific, Rising Sun and Golden West claims should thereafter be held and owned in common between the plaintiff and the defendant in the proportion of one-half each, and during said year and until the 4th day of June, 1914, the plaintiff and the defendant were in the joint possession [300] of said claims, claiming and holding the same as equal co-owners, and no other person whatsoever had or asserted any interest therein; that during said year the defendant performed the assessment work upon the Pacific lode claim for the joint use and benefit of the plaintiff and the defendant, and at the express request of the defendant, the plaintiff performed the annual assessment work upon the Over-the-Hill, Rising Sun and Golden West lode claims for the joint use and benefit of plaintiff and defendant; and the defendant is now estopped from asserting and claiming that the plaintiff was not a co-owner with the defendant in and to said claims during the said years, 1913 and 1914.

V.

That plaintiff is an *educated* prospector and is not familiar with the laws relating to the acquisition of titles to mining claims and for that reason did not suppose that it was essential or necessary in order to perfect his title to obtain a quitclaim or other conveyance from H. A. Bauer to his apparent interest by virtue of the location notice having been made in his name to the Over-the-Hill lode claim at the time that the said Bauer expressly acquiesced in the forfeiture hereinbefore alleged; that the defendant in the year 1915 was desirous of applying for patent to the said Over-the-Hill lode claim and knowing the condition of the record title, thereafter on December the 9th, 1915, it obtained from the said H. A. Bauer a quitclaim deed to the same for a nominal consideration, the defendant well knowing that the said Bauer in truth and in fact had no interest therein, but said deed was obtained solely for the purpose of perfecting the record title so that defendant might obtain patent; and said deed was, as a matter of law, obtained for the joint use and benefit of the plaintiff and the defendant, the actual and real owners of said claim.

VI.

Plaintiff further alleges that from the dates of the respective [301] location of the Over-the-Hill, Pacific and Golden West lode claims until February 12, 1913, he was in joint possession of said claims with the persons whose names said claims were located, claiming an interest therein as herein-

before set out: that his ownership of such interest was at all times recognized and admitted and during all of said time plaintiff fully performed his part of the annual work necessary to preserve their possessory rights under the mining laws.

That from the 12th day of February, 1913, until October 1915, he was in joint possession of said claims with the defendant, the defendant recognizing and admitting his right and title as an equal co-owner, and accepting the benefit of his labor thereon, until he was sent to the asylum in June 14, 1914, for the purposes of holding said claims and preserving the possessory rights thereto under the mining laws.

That defendant never asserted any rights adverse to the plaintiff's half interest in and to the said claims until it made the pretended purchase of plaintiff's said interest under the void and pretended sale by W. P. Mills, the pretended guardian of the plaintiff's estate in October, 1915; and defendant by reason of the said facts is now estopped from asserting or claiming that plaintiff was not such co-owner with it in said claims from and after February 12, 1913, to October, 1915.

Replying to the third affirmative defense, plaintiff alleges:

I.

Plaintiff admits that he was adjudged insane on June 4, 1914, and was sent to the Morningside Asylum, for treatment, and was discharged from said asylum on the 19th day of December, 1917. He further admits that at least as early as April, 1917,

the defendant discovered a large body of ore in the Over-the-Hill claim and that the defendant since said date at least has been mining the same. [302] He denies all and singular the other and remaining allegations in said third affirmative defense contained.

II.

Further replying to said answer plaintiff alleges that whatever moneys defendant may have expended in developing said claims and procuring patent, the amount is insignificant as compared with the sums taken therefrom, and all such sums so expended by defendant have long since been fully repaid out of the gold produced and extracted therefrom, and defendant is due and owing the plaintiff upon an accounting and after allowing it all proper charges for its expenditures aforesaid, which plaintiff is now and ever has been and here offers to allow, defendant is due and owing the plaintiff a sum of Five Hundred Thousand (\$500,000) Dollars.

III.

And further replying to said answer, plaintiff alleges:

That the true history and present status of the titles to the five mining claims in controversy herein as follows, viz.:

1st. The Over-the-Hill lode claim was located on March 26th, 1906, by plaintiff, Charles Peterson and W. R. Hanlon in the name of H. A. Bauer for the joint use and benefit of all four each owning an undivided one-quarter thereof; that on January

10, 1907, said Bauer purchased the undivided one-quarter of Charles Peterson, thereby becoming the owner of an undivided one-half, but plaintiff and Hanlon retained their interest; that said Bauer failed and refused to perform or pay for his part of the annual labor on said claim for the years 1909, 1910 and 1911, but such labor for said years was performed by plaintiff and W. R. Hanlon; that in the year 1912, the said Hanlon and plaintiff caused a notice to be given to the said H. A. Bauer under and in accordance with the statute in such cases made and provided, that unless he paid his part of such labor his interest would be forfeited to his said co-owners; that said [303] Bauer failed and refused to pay for his part of such labor and his interest thereby became forfeited to said Hanlon and plaintiff; that said Bauer had personal knowledge of said notice and forfeiture and thereafter acquiesced therein, and abandoned all claim to said mine; that on February 12, 1913, the defendant purchased of W. R. Hanlon, an undivided half interest in said claim, the same being the original one-quarter interest obtained by Hanlon as one of the original locators and one-half of the interest of H. A. Bauer, which had been forfeited to plaintiff and Hanlon the year preceding; that upon said purchase on February 12, 1913, the defendant became an equal co-owner in said claim with the plaintiff and went into joint possession and claiming under the same title with him; that on October 19, 1915, the defendant obtained the pretended deed to the half interest of the plaintiff from the said W. P. Mills under the

void and fraudulent proceedings set out in the plaintiff's complaint; that on December 9, 1915, defendant, though well knowing that said Bauer had no interest and claimed none, but merely for the purpose of perfecting the record title, obtained from H. A. Bauer, for a merely nominal consideration, a quitclaim to the said Over-the-Hill claim. But if said quitclaim deed in fact conveyed any interest, plaintiff alleges that defendant, as a matter of law, obtained it for the joint use and benefit of the plaintiff and defendant; that in the year 1918 the defendant obtained patent to the said Over-the-Hill in its own name, but in trust for plaintiff and defendant.

2d. The Rising Sun lode claim was located by the plaintiff on July 22, 1910; that plaintiff as sole owner performed the annual labor on said claim for the years 1911 and 1912; that on February 12, 1913, W. R. Hanlon, though he had no right, title, or interest in and to said claim, quitclaimed an undivided one-half [304] interest thereof to defendant; that thereafter plaintiff conceded to defendant its claim of an undivided one-half thereof in the settlement and agreement made between them in March, 1913, hereinbefore set out; that said claim also included in the void and fraudulent proceedings hereinbefore set out whereby the said W. P. Mills as pretended guardian of the plaintiff's estate, pretended to convey the plaintiff's interest to defendant.

3d. The Pacific lode claim was located by the said W. R. Hanlon on October 24, 1907; that plain-

tiff thereafter acquired an undivided half interest in said claim from said Hanlon; that defendant purchased of said Hanlon his remaining half interest on February 12, 1913; that plaintiff's half interest in said claim is also included in the void and pretended deed from W. P. Mills to defendant hereinbefore set out.

4th. That the Porphyry Lode claim was located by the plaintiff in 1912; that defendant's claim to the same is solely under the said pretended deed from W. P. Mills.

5th. The Golden West lode claim was located by W. R. Hanlon on July 22, 1910; that plaintiff thereafter acquired from the said Hanlon an undivided half interest in and to said claim; that thereafter on February 12, 1913, plaintiff purchased of said Hanlon his remaining half interest; that interest in said claim is also included in the pretended deed from W. P. Mills to defendant hereinbefore set out.

WHEREFORE plaintiff prays as in his complaint.

JNO. R. WINN and
J. H. COBB,
Attorneys for Plaintiff.

United States of America,
Territory of Alaska,—ss.

John Tuppela, being first duly sworn, on oath, deposes and says: I am the plaintiff above-named. The above and foregoing [305] reply is true as I verily believe.

JOHN TUPPELA.

Subscribed and sworn to before me this the 19th day of November, 1919.

[Notarial Seal]

J. H. COBB,

Notary Public in and for Alaska.

My commission expires June 8, 1923.

Filed in the District Court, District of Alaska, First Division. Nov. 20, 1919. J. W. Bell, Clerk. By L. E. Spray, Deputy.

Plaintiff's Exhibit No. 14. Received in Evidence Nov. 9, 1922, in Cause No. 2115—A. John H. Dunn, Clerk. [306]

Plaintiff's Exhibit No. 15.

THIS CONTRACT AND AGREEMENT, made and entered into this the 9th day of May, 1919, by and between John Tuppela, party of the first part, and John R. Winn and J. H. Cobb, parties of the second part,

WITNESSETH:

1st. The party of the first part has employed the parties of the second part as his attorneys at law, to bring a suit for him against the Chichagoff Mining Co. to recover an undivided half interest in and to the Over the Hill, Rising Sun, Pacific and Golden West lode claims, and the whole of the Porphyry lode claim, and the party of the first part being without any means except the said property, and unable to pay or secure to be paid the costs and expenses of said suit, it is agreed as follows:

2d. The parties of the second part agree to bring and prosecute to final judgment said suit with all

reasonable skill and diligence, and to advance to the party of the first part the necessary costs and expenses of such suit.

3d. In the event of a recovery in said suit, or of a compromise and settlement thereof, the amount recovered, including the amount that may be had for the use of said property by the defendant, as well as the property itself, that is the lode claims, shall be divided as follows: The advances made by the parties of the second part shall be first repaid, and the balance shall be equally divided between the party of the first part, and the parties of the second part, that is to say: After repaying the said advances the party of the first part shall pay to the parties of the second part a sum equal to one-half the amount in money or property recovered in said suit.

4th. The parties of the second part agree to use their best efforts and skill in representing the party of the first part in said suit, and the party of the first part agrees to accept and abide by the advice of the parties of the second part as his attorneys equally interested with him in the success of said suit, [307] including any proposed compromise and settlement.

Witness our hands in triplicate, this May 9th, 1919.

JOHN TUPPELA.

JNO. R. WINN.

J. H. COBB.

Witness:

HENRY LEPISTO.

Plaintiff's Exhibit No. 15. Received in evidence Nov. 9, 1922, in Cause No. 2115—A. John H. Dunn, Clerk.

Plaintiff's Exhibit No. 16.

(Copy.)

WHEREAS, I am the owner of the following described property to wit: An undivided one-quarter interest in and to the Over the Hill mining claim patented;

An undivided one-half interest in and to the Rising Sun claim, unpatented:

An undivided one-quarter interest in and to the Pacific lode claim, all situated on the west side of Chichagoff Island, Alaska, at or near the Chichagoff postoffice.

And Whereas, I have a claim for an accounting against the Chichagoff Mining Company, a corporation, for a large sum of money for ores taken by it from the said Over the Hill and Rising Sun claims;

And whereas, I have confidence in the integrity and ability of J. H. Cobb of Juneau, Alaska, and I am satisfied that it is for my best interest to vest in him the title and management of said property for my use and benefit, and I desire to be relieved of the burden and care of said property;

Now, therefore in consideration of the premises, and for the payment in hand to me of the sum of one dollar, I, John Tuppela of Juneau, Alaska, have this day bargained, sold and conveyed and assigned, and do by these presents, bargain, sell,

convey and assign, unto the said J. H. Cobb, all my right, title and interest in and to the [308] above-described property, and all other property, whether real, personal or mixed, of which I may now be the owner, or may hereafter acquire, including all choses in action, the purpose of this conveyance being to vest in the said J. H. Cobb my entire estate, present and prospective.

The title and property herein conveyed, however, shall be held in trust by the said J. H. Cobb, for the following uses and purposes, to wit:

1st. To enforce the payment and collection of all claims, moneys, and debts of every kind and description, owing or to become owing to me, either by suit, or by compromise as to him may seem best, and to reduce to possession, receive and receipt for, and give quitances for the same.

2d. To sell and dispose of, and execute conveyances of any and all said property both real and personal, on such terms and conditions as may seem to him for my best interest, and to receive the proceeds thereof.

3d. To pay out of the proceeds of said property, and moneys received by him, all debts due and owing or to become due and owing by me, including the compensation that may become due to him for services as my attorney in the case of John Tuppela vs. Chichagoff Mining Company under the contract now existing between us for such services.

4th. To invest all the moneys received by him hereunder or so much as he may deem wise, in in-

terest-bearing securities or otherwise, and to collect the income therefrom; and pay over to me for my personal use, the net income so collected by him or so much thereof as I may require, and to invest the balance. But if the said income shall not equal in any one year the sum of six thousand dollars, he shall upon my request, pay to me so much of the principal of the estate, as to make the sum of Six Thousand Dollars, for my personal use during said year. [309]

5th. At my death, the said Cobb shall pay over and distribute the property held by him hereunder as follows: One-half thereof to my niece, Mrs. Hilma Tuppela Hintsa of Chisholm, Minnesota. And one-half to my niece Sophia Tuppela of Jualaala Jlistara Vaasa, Finland, whose married name I do not know. In the event my said nieces shall not survive me, then the share here provided to be distributed to her, shall be distributed equally among her surviving children.

And thereupon this trust shall be fully executed.

6th. For the services performed hereunder my said trustee shall pay himself a reasonable compensation, which shall in no case, however, exceed the sum of five per cent upon moneys received and paid out by him, including the distribution provided for in the fifth paragraph hereof.

7th. My said trustee shall in no event be liable for any loss due to honest errors of judgment, but only for losses occasioned by or due to malfeasance, misfeasance, or negligence.

8th. My said trustee shall render me a statement

annually of the receipts and disbursements during the year, and of the amount and condition of the trust estate, and how invested, and where the securities and money is kept, and such other information in regard thereto as I may require.

9th. Should the said J. H. Cobb not survive me, then and in that event, I name and appoint his son E. L. Cobb, as his successor, who shall at once succeed to all the title, powers and duties herein vested in and conferred upon the said J. H. Cobb. And upon the demise of either of them, I reserve the right to appoint a successor to the survivor, if I shall so elect. [310]

10th. My said trustee is hereby given the right, at any time, after my said estate has been reduced to possession, and invested, as herein provided, to transfer this trust to such other trustee as we may mutually agree upon, we contemplating in that event, some reliable trust company; the purposes and objects of this deed being first to enable the said Cobb to settle up and terminate to the best advantage the present litigation between myself and the Chichagoff Mining Company, and second, to convert into money, and safely invest the proceeds of such litigation, and third, to relieve myself of all financial care and responsibility for the future.

Witness my hand this the 19th day of August, 1920.

(Signed) JAHAN TUPPELA.

Witnesses:

ADA WHITE.

EMERY VALENTINE.

United States of America,
Territory of Alaska,—ss.

Before me, the undersigned *authority*, on this day personally appeared John Tuppela, personally known to me to be the individual mentioned in and whose name is subscribed to the above and foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein set forth.

In testimony whereof, I have hereunto set my hand and official seal this the 19th day of August, A. D. 1920.

(Signed) ADA WHITE,
Notary Public in and for Alaska.

My commission expires June 30, 1924.

United States,
District of Alaska,
Division No. 1,
Sitka Precinct (No. 4),—ss.

I, W. DeArmond, Commissioner and *ex-officio* Recorder for Recording #796 District of Sitka (No. 4), do hereby certify that the [311] within and foregoing instrument of writing was filed for record in my office on the 21st day of August, A. D. 1920, at — min. past 7 o'clock P. M. and duly recorded in Deeds Record, book 3, on page 420 of the records of the Recording District of Sitka (No. 4) Division No. 1 District of Alaska.

Attest: R. W. DeARMOND,
Commissioner and *ex-officio* Recorder.

Plaintiff's Exhibit No. 16. Received in evidence

Nov. 9, 1922, in Cause No. 2115—A. John H. Dunn,
Clerk.

Plaintiff's Exhibit No. 17.

In the District Court for Alaska, Division No. One,
at Juneau.

No. 1841—A.

JOHN TUPPELA,

Plaintiff,

vs.

CHICHAGOFF MINING COMPANY, a Corpora-
tion,

Defendant.

COUNTER-AFFIDAVIT OF JOHN TUPPELA.

United States of America,

Territory of Alaska,—ss.

John Tuppela, being first duly sworn on oath, deposes and says: I have heard read the affidavit of H. A. Bauer, dated September 5, 1919. It is not true, as stated in said affidavit, that W. R. Hanlon located for the said Bauer the Over the Hill lode claim, nor is it true that said claim was located solely for the said H. A. Bauer; that the true facts concerning the location of said claim are as follows, to wit:

Some time in March, 1906, W. R. Hanlon, Charles Peterson and myself left Sitka, Alaska, together to go prospecting in the region around Chichagoff, Alaska, where discoveries of gold had [312] then

recently been made. H. A. Bauer was not then in Sitka, and I did not see him for some months thereafter. Hanlon claimed to be Bauer's agent under some sort of a grubstake arrangement and furnished the grub for the outfit, and between us three it was understood and agreed that all claims located would be shared in common; that is to say, one quarter each to Bauer, Hanlon, Peterson and myself. On the trip we located five claims, namely: The Aurated, Authentic, Cablegram, Mystery and Over the Hill. The Over the Hill was located in the name of H. A. Bauer by Hanlon as agent. The Mystery was located in my name and Charles Peterson. I do not recall in whose name the other three were located, as they were all shortly thereafter abandoned. The arrangement and understanding between Hanlon, Peterson and myself was thereafter fully confirmed and ratified by the said Bauer by his acting thereon and in accordance with said agreement and his recognition of its binding force and effect. On or about January 7, 1907, Bauer bought out the quarter interest of Charles Peterson in and to said claims and received a deed for the same which was prepared by the said Bauer, and as a consideration therefor conveyed to Peterson a house and lot in Sitka. At the same time that this purchase was made from Peterson, Bauer prepared in his own handwriting a power of attorney, authorizing him to sell my interest in said claims and at his request I executed the same. On the same day he also prepared a power of attorney for Hanlon to sign, authorizing him to sell Hanlon's in-

terest. At the time of this transaction Bauer was endeavoring to organize or promote a company for the purpose of taking over said claims and paying us for the same. [313]

It is not true as is stated in said affidavit that Bauer or anyone else ever employed me to do any assessment work on the Over the Hill claim or paid me for any such assessment work. Nor is it true that I ever received any wages or was promised any wages or board for the work done by me in locating the Over the Hill claim and the other four claims mentioned when on said prospecting trip in March, 1906. Every year from 1906 up to and inclusive of the year 1913, I performed the assessment work on the Over the Hill claim as owner thereof, and had the same placed on record and was in possession of said claim asserting my rights thereto during all said years, all of which was known to both Hanlon and Bauer and neither of them during said time ever at any time objected to my possession and working of said claim, nor did they pretend that I was not *a* owner thereof, and no such claim was ever made by the said Bauer until after the bringing of this suit.

I have also heard read the affidavit of J. L. Freeburn dated September 9, 1919. It is true as stated in said affidavit on the second page thereof that after the Chichagoff Mining Company made the purchase of an undivided half interest from W. R. Hanlon I did represent to the company and to Freeburn that I was an owner not of an undivided half interest, but of an undivided three-quarters interest

in the Over the Hill claim and I also claimed to own in full the Rising Sun claim. After explaining to him as fully as I could the status of the title of which he seemed to be familiar as he knew of my long possession and working said claims. It is not true as stated in said affidavit that said claims were considered valueless as mining claims, for it was known to Freeburn, to me and to others who had investigated the claims that they were on the mineralized zone running through Chichagoff mountain and included the apex of said zone and said zone was then known to be highly mineralized and to contain shoots of very high grade and valuable ore and the Over the Hill and [314] Rising Sun especially were known to be of great value. In the course of the conversation referred to by Freeburn in said affidavit which, to the best of my recollection was in March, 1913, he stated that the company had bought a half interest from Hanlon and that no one else was asserting or could assert any claims to the ground other than the company and myself and he then proposed that each should recognize the other's half interest in the claims and that the company and I should hold them as co-owners in equal amounts and avoid litigation and further mistakes. To this I assented and that year I performed the work upon the Over the Hill, Rising Sun and Golden West and the Chichagoff Mining Company paid me the difference between the amount I had done for our joint use and benefit and the amount it had done on the Pacific and proofs of labor were prepared by the company at its office in Chichagoff for the

work on the Over the Hill as done by me at the joint expense and for the joint use of the Chichagoff Mining Company and myself.

There was no notice whatever served upon me, nor did I have any knowledge of the application of the agreement of a guardian of my estate in the year 1914. I did not learn that W. P. Mills was acting as guardian of such estate, and as such guardian, had attempted to dispose of my property until the fall of the year 1918 when I returned from the Morningside Asylum to Alaska to look after my property. As soon as I reached Sitka, I made inquiries and learned that the Chichagoff Mining Company was then claiming adversely to me through the deed of W. P. Mills. Mr. Mills said he had some money for me, the proceeds of said sale which he would pay over if I would sign a paper which I understood to be a ratification and confirmation of his actions in selling my property. I refused to sign the paper or accept the money or any part of it and as soon thereafter as I could, I consulted counsel [315] and brought this suit.

JOHN TUPPELA.

Subscribed and sworn to before me this 12th day of September, 1919.

J. H. COBB,

Notary Public in and for Alaska.

My commission expires June 8, 1923.

Plaintiff's Exhibit No. 17. Received in evidence Nov. 9, 1922, in cause No. 2115—A. J. H. Dunn, Clerk.

The above and foregoing bill of exceptions contains all the evidence produced by the parties, and all the instructions given the jury, together with all of the exhibits received in evidence, with the exception of Plaintiff's Exhibit No. 4.

And because the above and foregoing matters do not appear of record, I, Thomas M. Reed, the Judge before whom said cause was tried, do hereby certify to the above and foregoing as a true and correct bill of exceptions and order the same allowed, filed and made a part of the record herein.

Signed, sealed and allowed this, the 30th day of December, 1922, and during the term at which said cause was tried.

THOS. M. REED,
Judge.

Filed in the District Court, District of Alaska, First Division. Jan. 2, 1923. John H. Dunn, Clerk. By W. B. King, Deputy. [316]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHISON,

Plaintiff,

vs.

JOHN TUPPELA et al.,

Defendants.

Assignment of Error.

Now come the defendants, and assign the following errors committed by the Court during the trial and in the rendition of the judgment herein to wit:

I.

The Court erred in denying the *the* motion of the defendants made at the conclusion of the evidence, for an instructed verdict for the defendants on the second cause of action.

II.

The Court erred in refusing the prayer of the defendants to instruct the jury as follows:

“Gentlemen of the Jury: The contract upon which the plaintiff sues in this case, obligated him, as an attorney at law, to bring a suit in behalf of the defendant, John Tuppela, against the Chichagoff Mining Company to recover certain mining property on Chichagoff Island, Alaska. Such a suit could only be brought in the courts of Alaska; therefore, while the contract is silent as to the place where the suit was to be brought, it is to be read and construed as though it expressly provided for the bringing of the suit in the courts of Alaska. It further appears that at the time of making the contract, plaintiff was not qualified in law to bring such suit or perform the services he was obligated to perform under it, nor did he, during the time [317] he claims the contract was in force, or at any time, qualify himself to perform the contract by complying with the laws of Alaska, and becom-

ing a member of the bar of this court. He cannot therefore, recover anything from a breach of said contract, or for any services he may have rendered under it."

III.

The Court erred in instructing the jury as follows:

"It is admitted by the plaintiff in his reply, that he has not been admitted to practice as an attorney at law in the courts of the Territory of Alaska, but it is alleged that he is an attorney and was at all times mentioned in the complaint an attorney authorized to practice in the courts of the State of Oregon where the contract appears to have been made.

I instruct you, as a matter of law, that the courts of the Territory of Alaska, wherein the real property mentioned in plaintiff's complaint and described in the contract is situated, have the sole jurisdiction of an action to recover the mining property therein mentioned; and if the plaintiff was not authorized to practice the profession of attorney at law in the Territory of Alaska at the time of entering into such a contract, he would not be qualified to perform the professional services required by said contract, and if that were so, without any other stipulation being entered into in said contract, it would be a defense to said action.

But if you further find from the evidence that the defendant Tuppela, who entered into said contract of employment with the plaintiff, was informed of such fact of plaintiff not being author-

ized to practice in Alaska at the time of entering into the said contract, and that such contingency, with the knowledge and consent of the said Tuppela was provided for in said contract by authorizing the plaintiff to associate competent [318] counsel, authorized to prosecute the contemplated proceedings, suits or actions with the plaintiff, and without expense to the defendant Tuppela, then the fact that the plaintiff was not authorized to practice law in the Territory of Alaska would be no defense in this action, and if you so find, you will not further consider said defense."

IV.

The court erred in instructing the jury as follows:

"Answering the first question, this question is comprehended in the third question and both may be answered as one. I instruct you that when the relation of attorney and client exists, it is requisite that there should be mutually the utmost frankness, candor, trust and confidence between them, and where there arises between them distrust or lack of confidence reasonably to be inferred from the conduct of either, then the party responsible for the reasonable lack of confidence or distrust is the party at fault. For that reason, all the facts, circumstances and conditions concerning the relations of the parties to this action—that is, the defendant Tuppela and the plaintiff Mathison, were admitted in evidence for your determination whether the defendant Tuppela, without justification, or wrong-

fully, discharged plaintiff, or whether the plaintiff wrongfully abandoned the contract.

There is in this case no evidence of a formal dismissal of the plaintiff from the services of the defendant, and the question as to whether he was discharged must be inferred by the jury one way or the other from the circumstances surrounding the case and the actions of the parties. The plaintiff claims that he was discharged by the defendant Tuppela and bases his contention on the acts of the defendant Tuppela [319] in connection with the case, which he says and which he insists, amount to a discharge. It, under these conditions, becomes your duty to determine, from the facts and circumstances and conditions produced in evidence, whether or not the acts of defendant Tuppela were such as would lead a reasonable man, under the circumstances, to believe that he was discharged. If you find from the evidence that they were such acts of the defendant Tuppela, as to lead a reasonable man to believe that he was discharged, then it would be your duty to find that he, the plaintiff, was discharged. If there were not, your duty would be to find that he was not discharged.”

V.

The Court erred in instructing the jury as follows:

“The second question arising, if you find that the plaintiff was discharged by the defendant, is, was the discharge wrongful or without sufficient cause? In the consideration of this question, you should

consider whether or not the acts of the plaintiff were such as to cause a reasonable man, being a client, to lose confidence in the promptness, ability and fair dealing of his attorney. If they were, the discharge would not be wrongful or without sufficient cause. On the other hand, if such acts were not such as to make a reasonable man lose confidence in the promptness, skill and ability of his attorney, and without such reasonable cause he discharged him, you should find that the attorney was wrongfully discharged.”

And for said errors and others manifest of record, the defendants pray that the judgment of the District Court be reversed, and the cause remanded for such further proceedings as the Appellate Court may direct.

J. H. COBB,

Attorney for Defendants and Plaintiffs in Error.

Filed in the District Court, District of Alaska,
First Division. Dec. 30, 1922. John H. Dunn,
Clerk. [320]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHESON,

Plaintiff,

vs.

JOHN TUPPELA et al.,

Defendants.

Writ of Error.

United States of America,—ss.

The President of the United States to the Judge
of the District Court of the United States for
Alaska, Division Number One, GREETING:

Because in the record and proceedings as also in the rendition of a judgment of a plea which is before you, wherein Enoch E. Matheson is plaintiff and John Tuppela, J. H. Cobb as Trustee for John Tuppela and Grover C. Winn as guardian of the person of John Tuppela are defendants, a manifest error hath happened to the great damage of the said John Tuppela, J. H. Cobb as Trustee for John Tuppela and Grover C. Winn as guardian of the person of John Tuppela, as by their petition doth appear.

We being willing that error, if any hath happened, should be duly corrected, and speedy justice done to the parties in that behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things pertaining thereto, to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, State of California, so that you have the same before said Court on or before thirty days from the date of this writ, so that the record and proceedings aforesaid, being inspected, the said [321] Circuit Court of Appeals may cause further to be done therein, to correct that error, what of right and

according to the laws and customs of the United States ought to be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, and the seal of the District Court for Alaska, Division Number One, affixed at Juneau, Alaska, this the 30th day of December, 1922.

[Seal]

JOHN H. DUNN,
Clerk.

By _____,

Allowed this the 30th day of December, 1922.

THOS. M. REED,
Judge.

Filed and served by lodging a true copy with the Clerk of the District Court.

Filed in the District Court, District of Alaska First Division. Dec. 30, 1922. John H. Dunn, Clerk. By _____, Deputy. [322]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHESON,

Plaintiff,

vs.

JOHN TUPPELA et al.,

Defendants.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS, that we, John Tuppela, J. H. Cobb, as Trustee for John Tuppela and Grover C. Winn as guardian of the person of John Tuppela, as principals, and B. M. Behrends, as surety, hereby acknowledge ourselves to be indebted and bound to pay to Enoch E. Matheson, the sum of Five Thousand (\$5,000.00) Dollars, good and lawful money of the United States, for the payment of which sum, well and truly to be made, we hereby bind ourselves, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

The condition of this obligation is such, however, that whereas the above bound John Tuppela, J. H. Cobb, as Trustee for John Tuppela, and Grover C. Winn, as the guardian of the person of John Tuppela, have sued out a writ of error in the above-entitled cause from the United States Circuit Court of Appeals, for the Ninth Circuit to reverse the judgment rendered in said cause on the 18th day of November, 1922.

Now, if the said John Tuppela, J. H. Cobb as Trustee for John Tuppela and Grover C. Winn as guardian of the person of John Tuppela shall prosecute their writ of error to effect and pay all such damages and costs as may be awarded [323] against them if they fail to make their plea good, then this obligation shall be null and void; otherwise to remain in full force and effect.

Witness our hands this the 30th day of Dec., 1922.

JOHN TUPPELA,

By J. H. COBB,

His Guardian ad Litem.

J. H. COBB,

As Trustee for John Tuppela.

GROVER C. WINN,

As Guardian of the Person of John Tuppela.

B. M. BEHREND.

Approved as to form and sufficiency of surety this the 30th day of December 1922. Said bond to operate as a supersedeas from the filing thereof.

THOS. M. REED,

Judge.

Filed in the District Court, District of Alaska, First Division. Dec. 30, 1922. John H. Dunn, Clerk. [324]

In the District Court for the District of Alaska,
Division Number One, at Juneau.

No. 2115—A.

ENOCH E. MATHESON,

Plaintiff,

vs.

JOHN TUPPELA et al.,

Defendants.

Citation on Writ of Error.

United States of America,—ss.

The President of the United States to Enoch E. Matheson and R. E. Robertson, His Attorney,
GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit to be held at the City of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error lodged in the clerk's office for the District Court for Alaska, Division Number One, in a cause wherein John Tuppela, J. H. Cobb, as Trustee for John Tuppela, and Grover C. Winn, as guardian of the person of John Tuppela, are defendants in error and you are plaintiffs in error, then and there *to cause*, if any there be, why the judgment in said writ of error mentioned should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this the 30th day of Dec., 1922.

THOS. M. REED,
Judge.

Service of the above and foregoing writ of error is admitted this the 30th day of December, 1922.

R. E. ROBERTSON,
Attorney for Plaintiff in Error.

Filed in the District Court, District of Alaska, First Division. Dec. 30, 1922. John H. Dunn, Clerk. [325]

In the District Court for the District of Alaska,
Division Number One, At Juneau.

No. 2115—A.

ENOCH E. MATHESON,

Plaintiff,

vs.

JOHN TUPPELA et al.,

Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

Sir: You will please make up the transcript of the record in the above-entitled and numbered cause, and include therein the following papers, to wit:

1. Complaint, filed Oct. 13, 1921.
2. Second amended answer, filed June 17, 1922.
3. Reply to second amended answer, filed July 22, 1922.
4. Judgment.
5. Bill of exceptions.
6. Assignments of error.
7. Writ of error.
8. Bond on writ of error.
9. Citation.
10. This praecipe.

Said transcript to be made up in accordance with the rules of the United States Circuit Court of Appeals for the Ninth Circuit, and transmitted to

the clerk of said Court, at San Francisco, California.

J. H. COBB,

Attorney for Plaintiffs and Plaintiffs in Error.

Filed in the District Court, District of Alaska,
First Division. Dec. 30, 1922. John H. Dunn,
Clerk. By —————, Deputy. [326]

In the District Court for the District of Alaska,
Division No. 1, at Juneau.

**Certificate of Clerk U. S. District Court to Trans-
script of Record.**

United States of America,
District of Alaska,
Division No. 1,—ss.

I, John H. Dunn, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 326 pages of typewritten matter, numbered from one to 326, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per praecipe of the plaintiffs in error on file herein and made a part hereof, in the cause wherein John Tuppela, J. H. Cobb, as trustee for John Tuppela, and Grover C. Winn, as Guardian of the Person of John Tuppela, are Plaintiffs in Error, and Enoch Mathison is Defendant in Error, No. 2115—A, as the same appears of record and on file in my office, and that said record is by virtue of a

writ of error and citation issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and that the cost of preparation, examination and certificate amounting to One Hundred Forty-nine and 70/100 Dollars (\$149.70), has been paid to me by the attorneys for plaintiffs in error.

In Witness Whereof I have hereunto set my hand and the seal of the above-entitled court this 9th day of January, 1923.

[Seal]

JOHN H. DUNN,
Clerk. [327]

[Endorsed]: No. 3973. United States Circuit Court of Appeals for the Ninth Circuit. John Tuppela, J. H. Cobb, as Trustee for John Tuppela, and Grover C. Winn, as Guardian of the Person of John Tuppela, Plaintiffs in Error, vs. Enoch E. Mathison, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Alaska, Division No. 1.

Filed January 22, 1923.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

IN THE
United States
Circuit Court of Appeals 7
For the Ninth Circuit

JOHN TUPPELA, J. H. COBB as Trustee for John
Tuppela, and GROVER C. WINN as Guardian
of the person of John Tuppela,
Plaintiffs in Error,

vs.

ENOCH E. MATHESON,
Defendant in Error.

Brief for the Plaintiffs in Error.

Upon Writ of Error from the District Court for
Alaska, Division Number One.

J. H. COBB,
Attorney for Plaintiffs in
Error, and Guardian ad litem
for John Tuppela.

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN TUPPELA, J. H. COBB as Trustee for John
Tuppela, and GROVER C. WINN as Guardian
of the person of John Tuppela,
Plaintiffs in Error,

vs.

ENOCH E. MATHESON,
Defendant in Error.

**Upon Writ of Error from the District Court for
Alaska, Division Number One.**

Brief for the Plaintiffs in Error.

J. H. COBB, Guardian ad litem for John Tuppela
and Attorney for Plaintiffs in Error.

Statement of the Case

This was an action brought in the Court below by the defendant in error, as plaintiff, against the plaintiffs in error, as defendants, and we will hereinafter for convenience, designate the parties respectively as plaintiff and defendant.

The complaint sets forth three causes of action. In the first, the plaintiff alleged the insanity of John Tuppela; that J. H. Cobb was Trustee of all the property and estate of John Tuppela and that Grover C. Winn was the guardian of his person; that the plaintiff was an attorney-at-law and that on March 11, 1918, the plaintiff and the defendant, John Tuppela, entered into a contract whereby the plaintiff was

employed by Tuppela as an attorney-at-law to recover for him certain mining claims in Alaska, together with damages for the detention thereof, against the Chichagoff Mining Company, and in consideration of the services to be rendered, agreed and promised to pay him, the plaintiff, one-half of all sums of money recovered as damages and one-half of all property recovered; that the defendant Tuppela, in September, 1918, wrongfully breached said contract by wrongfully discharging the plaintiff from such employment and preventing him from performing further services thereunder. It was further alleged that the defendant Tuppela thereafter employed other counsel who brought suit and recovered property and money of the aggregate value of \$900,000.00. It was further alleged that the plaintiff had rendered valuable services under his said employment, to-wit: Of the value of \$150,000.00, and prayed for judgment for said sum on his first cause of action.

On his second cause of action, plaintiff made the same allegations of fact as under the first, except as to the service rendered and the value thereof, and alleged further that but for the breaching of the contract by the defendant Tuppela, he could and would have performed his part of the contract and have received one-half of the money and property recovered, and that by reason of the breaching he lost the value of said contract which he alleged to be \$450,000.00, and asked judgment for said sum.

The third cause of action was for money loaned by the plaintiff to Tuppela in the aggregate sum of \$362.50. (Rec. pp. 1-20.)

The defendants denied that the plaintiff was an attorney-at-law, and further denied the contract as plead, but admitted a contract between Tuppela and the plaintiff, a true copy of which was attached as

an exhibit to the answer. They further denied that plaintiff was discharged by the defendant Tuppela, wrongfully or otherwise. They denied that plaintiff had performed any services for the defendant Tuppela. They denied that the contract was of any value to the plaintiff or that he could or would have performed the same on his part, and they denied that plaintiff had loaned Tuppela any money.

As affirmative defenses the defendants alleged:

FIRST: That at the time of the execution of the contract referred to in the complaint the plaintiff was not now, and never had been, qualified and capable of performing on his part the duties and professional services therein undertaken by him, in that—it became and was the duty of the plaintiff under said contract and it was in the contemplation of the parties thereto that the plaintiff should bring an action in the name of John Tuppela against the Chichagoff Mining Company to recover the property in the contract mentioned, and that such suit could only be brought in the District Court for Alaska, and that plaintiff was not at the time of the execution of the contract, and was not now and never had been, admitted to practice in the courts of Alaska, and could not at said time become so qualified.

SECOND: That if it be true as complained by the plaintiff that if the defendant John Tuppela did discharge the plaintiff as his attorney that such discharge was justified by reason of the negligence of the plaintiff in failing, neglecting and refusing to bring the suit contemplated in the contract for more than one year from the date of the said contract of employment, or to come to Alaska and investigate the rights and titles of the said Tuppela thereunder, or to take any steps whatsoever toward a compliance with said contract on his part.

THIRD: That the defendant became insane in the early part of the year 1914, and was sent to an asylum, and was discharged on December 17, 1917; that about March 1, 1918, he met the plaintiff at Astoria, Oregon; that the plaintiff held himself out as an attorney-at-law; that Tuppela was an ignorant miner and prospector, unable to read or write the English language, and was at said time in bad health, mentally and physically, and utterly destitute; that all the property he owned was the mining property mentioned in the complaint, which was then in the possession of the Chichagoff Mining Company, and claimed by it through alleged conveyance of Tuppela's title; that Tuppela was desirous of finding an attorney who could and would undertake to provide the money to meet the necessary expenses of bringing and prosecuting to final judgment, a suit in his behalf to recover said claims, with reasonable skill and diligence, in consideration of a moiety of the fruits of said litigation, the said Tuppela having no other means whatsoever of procuring such money and legal services; that Tuppela fully acquainted the plaintiff with his condition, and all the facts concerning his rights to the property, and plaintiff then and there agreed on his part to bring such suit for Tuppela and prosecute the same to final judgment with reasonable skill and diligence, and furnish all moneys necessary for the expenses of the suit and for the support of Tuppela during the litigation, in consideration of an undivided half interest in the property in the event plaintiff should succeed in recovering the same for Tuppela. That after the agreement and understanding between plaintiff and Tuppela had been reached, plaintiff, as Tuppela's attorney, undertook to reduce the same to writing, but in so doing plaintiff intentionally and fraudulently

omitted from such writing, the obligation on the part of the plaintiff to furnish said money, and to bring and prosecute the suit with reasonable skill and diligence, but falsely represented to Tuppela that the contract correctly embodied their agreement, and Tuppela, being unable to read said contract, and relying upon the representation of the plaintiff, signed the same, believing it contained the stipulations and undertakings of the plaintiff aforesaid. A copy of the contract as signed by both parties was attached to the answer.

FOURTH: That after the employment of the plaintiff by the defendant Tuppela on March 11, 1918, the plaintiff wilfully and negligently failed to file said suit, or take any steps whatsoever under his said employment; that Tuppela waited upon plaintiff for more than a year; repeatedly requested him to file said suit; that plaintiff failed to do anything and wholly abandoned his said employment, and that on or about May 2, 1919, defendant Tuppela employed other counsel to perform such services, upon substantially the same terms as he had formerly employed the plaintiff; that plaintiff knew of such employment, and knew that such employment was had under the belief on the part of Tuppela that the plaintiff had abandoned his connection with the case, and so knowing, plaintiff made no objection thereto, and did not aid nor offer to aid in any way the prosecution of the suit, but acquiesced in the changes made in his situation and obligations on the part of Tuppela, intending, however, to thereby escape all the burdens, risks and obligations of his said employment, but in the event of a recovery of the property through the efforts, risks and expense of other counsel so employed by Tuppela, to assert a claim under the said contract of March 11, 1918. That if plain-

tiff had not in fact abandoned his said employment, it was his duty to, and he could and would have aided and taken part in the prosecution of said suit, and shared in the burdens and risks as well as the benefits resulting from the success finally achieved; that by his conduct aforesaid, plaintiff misled the said Tuppela and induced him to employ other counsel and pay them full value for professional services in said suit and that by reason of the premises, plaintiff is estopped to claim said contract of March 11, 1918, was not abandoned.

FIFTH: That if plaintiff did not abandon the contract of employment as stated above, prior to the time of the employment of other counsel by Tuppela, he was guilty of gross professional negligence, which justified the said Tuppela in discharging him, in that—he knew, or by the use of ordinary skill and diligence, should have known, that delay in bringing the suit and the prompt assertion of the claim of Tuppela to the property would greatly endanger the rights of the said Tuppela thereto, by laying the foundation for a plea of laches by the Chichagoff Mining Company; that it was the plaintiff's duty immediately upon accepting said employment, to bring and prosecute said suit with reasonable skill and diligence, but the plaintiff wilfully and negligently failed to bring said suit, or take any steps whatsoever therein, and after the expiration of more than a year from the date of the employment, Tuppela, in order to avoid the consequences to himself of the plaintiff's neglect, employed other counsel, and put an end to his contract with the plaintiff.

SIXTH: In answer to the third cause of action, it was alleged that if the plaintiff had advanced any money, as alleged in his complaint, the same was advanced under his contract, and was only to be repaid

upon the successful termination of the suit to be brought and prosecuted by the plaintiff; that the plaintiff wholly failed to bring said suit, and the money so advanced by him, if any, was of no benefit whatever to Tuppela, but was expended solely in a futile effort by the plaintiff to earn a fee. (Rec. pp. 22-32.)

In the reply, the plaintiff admitted that he was not now and had never been a member of the Alaska bar. All the other material allegations of the answer were put in issue. (Rec. pp. 36-38.)

At the trial, the plaintiff elected as between his first and second cause of action to stand upon the second, and the case was tried to a jury upon the second and third cause of action, and resulted in a verdict and judgment for \$2,500.00 on the second cause of action, and \$362.50 on the third cause of action. (Rec. pp. 40-41 and 44.)

At the conclusion of the evidence, the defendants made the following motion:

Now come the defendants, the evidence having been concluded, and move the Court to instruct the jury to return a verdict for the defendants upon the second cause of action on the following grounds, to-wit:

FIRST: There is nothing in the pleadings or the evidence to sustain a verdict against the defendant, J. H. Cobb, as trustee for John Tuppela.

SECOND: Because the evidence shows conclusively that plaintiff was not at the time of the making the contract sued upon, or subsequently, a member of the bar of Alaska, or qualified to become a member, and not qualified to perform the contract on his part; and it further shows that he never employed associate counsel, as he might have done under the contract, to perform the contract with him, and there

was not, and never has been any party to said contract, either originally or by association with plaintiff thereunder, qualified and capable of performing.

THIRD: Because the suit is based and bottomed upon the allegation that the plaintiff was wrongfully discharged by the defendant Tuppela, and the evidence fails to show that plaintiff was ever wrongfully discharged, or discharged at all. The most that is shown is that John Tuppela neglected his case and failed to co-operate with the plaintiff in his employment, and plaintiff thereupon elected to treat such conduct as a discharge and abandoned his contract.

FOURTH: The evidence conclusively shows that plaintiff was guilty of such gross negligence and delay as fully justified Tuppela in ignoring the contract and employing other counsel to protect his rights.

FIFTH: Neither the pleadings nor the evidence would sustain a verdict and judgment for plaintiff on the second cause of action, for this: Tuppela had a legal right to discharge plaintiff as his attorney with or without cause, subject only in the latter case to payment for services rendered, and plaintiff's remedy is a suit in quantum meruit, and not for damages on the contract.

But the Court denied said motion, and the defendants excepted. (Rec. pp. 284-286.)

Upon the trial a great deal of irrelevant and immaterial testimony was admitted over the defendants' objections, to which exceptions were taken. But as in our view of the case, its decision must turn upon certain questions of law arising upon undisputed facts, no errors have been assigned upon the rulings of the Court upon the evidence, and the case is presented here upon the following:

Assignments of Error.

I.

The Court erred in denying the motion of the defendants made at the conclusion of the evidence, for an instructed verdict for the defendants on the second cause of action.

II.

The Court erred in refusing the prayer of the defendants to instruct the jury as follows: Gentlemen of the Jury. The contract upon which the plaintiff sues in this case, obligated him, as an attorney-at-law, to bring a suit in behalf of the defendant, John Tuppela, against the Chichagoff Mining Company to recover certain mining property on Chichagoff Island, Alaska. Such a suit could only be brought in the Courts of Alaska; therefore, while the contract is silent as to the place where the suit was to be brought, it is to be read and construed as though it expressly provided for the bringing of the suit in the Courts of Alaska. It further appears that at the time of making the contract, plaintiff was not qualified in law to bring such suit or to perform the services he was obligated to perform under it, nor did he, during the time he claims the contract was in force or at any time, qualify himself to perform the contract by complying with the laws of Alaska, and becoming a member of the bar of this Court. He cannot therefore recover anything for a breach of said contract, or for any services he may have rendered under it.

III.

The Court erred in instructing the jury as follows:

It is admitted by the plaintiff in his reply, that he has not been admitted to practice as an attorney-at-law in the Courts of the Territory of Alaska, but it is alleged that he is an attorney and was at all times

mentioned in the complaint an attorney authorized to practice in the courts of the State of Oregon where the contract appears to have been made.

I instruct you, as a matter of law, that the courts of the Territory of Alaska, wherein the real property mentioned in plaintiff's complaint and described in the contract is situated, have the sole jurisdiction of an action to recover the mining property therein mentioned; and if the plaintiff was not authorized to practice the profession of attorney-at-law in the Territory of Alaska at the time of entering into such a contract, he would not be qualified to perform the professional services required by said contract, and if that were so, without any other stipulation being entered into in said contract, it would be a defense to said action.

But if you further find from the evidence that the defendant Tuppela, who entered into said contract of employment with the plaintiff, was informed of such fact of plaintiff not being authorized to practice in Alaska at the time of entering into the said contract, and that such contingency, with the knowledge and consent of the said Tuppela was provided for in said contract by authorizing the plaintiff to associate competent counsel, authorized to prosecute the contemplated proceedings, suits or actions with the plaintiff, and without expense to the defendant Tuppela, then the fact that the plaintiff was not authorized to practice law in the Territory of Alaska would be no defense in this action, and if you so find, you will not further consider said defense.

IV.

The Court erred in instructing the jury as follows:

Answering the first question, this question is comprehended in the third question, and both may be answered as one. I instruct you that when the rela-

tion of attorney and client exists, it is requisite that there should be mutually the utmost frankness, candor, trust and confidence between them, and where there arises between them distrust or lack of confidence reasonably to be inferred from the conduct of either, then the party responsible for the reasonable lack of confidence or distrust, is the party at fault. For that reason, all the facts, circumstances and conditions concerning the relations of the parties to this action—that is, the defendant Tuppela and the plaintiff Matheson, were admitted in evidence for your determination whether the defendant Tuppela, without justification, or wrongfully, discharged plaintiff, or whether the plaintiff wrongfully abandoned the contract.

There is in this case no evidence of a formal dismissal of the plaintiff from the services of the defendant, and the question as to whether he was discharged must be inferred by the jury one way or the other from the circumstances surrounding the case and the actions of the parties. The plaintiff claims that he was discharged by the defendant Tuppela, and bases his contention on the acts of the defendant Tuppela in connection with the case, which he says and which he insists, amount to a discharge. It, under these conditions, becomes your duty to determine, from the facts and circumstances and conditions produced in evidence, whether or not the acts of the defendant Tuppela were such as would lead a reasonable man, under the circumstances, to believe that he was discharged. If you find from the evidence that they were such acts of the defendant Tuppela, as to lead a reasonable man to believe that he was discharged, then it would be your duty to find that he, the plaintiff, was discharged. If they were not, your duty would be to find that he was not discharged.

V.

The Court erred in instructing the jury as follows:

The second question arising, if you find that the plaintiff was discharged by the defendant, is, was the discharge wrongful or without sufficient cause? In the consideration of this question, you should consider whether or not the acts of the plaintiff were such as to cause a reasonable man, being a client, to lose confidence in the promptness, ability and fair dealing of his attorney. If they were, the discharge would not be wrongful or without sufficient cause. On the other hand, if such acts were not such as to make a reasonable man to lose confidence in the promptness, skill and ability of his attorney, and without such reasonable cause he discharged him, you should find that the attorney was wrongfully discharged. (Rec. pp. 362-6.)

Argument.

There are five controlling questions of law arising upon these assignments.

FIRST: Neither the pleadings nor evidence tended to show any liability to the plaintiff in the part of the defendant J. H. Cobb, as Trustee for John Tuppela. (First assignment.)

SECOND: The plaintiff not being a member of the bar of Alaska, had no capacity to perform the services stipulated in the contract, and could not recover either on the contract or in quantum meruit. (First, second and third assignments.)

THIRD: The failure of the proof to show that plaintiff was discharged by Tuppela. (First, fourth and fifth assignments.)

FOURTH: The proof showed conclusively that plaintiff had been guilty of such negligence as fully justified Tuppela in discharging him as his attorney in any event. (First and fifth assignments.)

FIFTH: Plaintiff's remedy was a suit on quantum meruit for the value of the services rendered, and not for damages on the contract. (First assignment.)

We will present these questions in the order above stated.

FIRST: J. H. Cobb, as Trustee for John Tupela, was a stranger to the contract sued upon. No rule is better settled than that a stranger to a contract cannot be sued thereon. 12 Corp. Juris 713. We pass this ground without further comment.

SECOND: Plaintiff is not and was not admitted to practice in the courts of Alaska. (Rec. pp. 116.) He was only admitted to practice in July 1915, in the courts of Oregon, (Rec. pp. 331) less than three years before he made the contract sued on, which was March 11, 1918. He could not under the law be admitted to practice in Alaska for some two years more. He was never therefore, capable of performing the services he assumed to perform under the contract, and cannot recover thereon. The point was raised both on the motion for an instructed verdict and by the requested instruction which are denied. (Rec. pp. 281-287.)

Section 1565 of the Compiled Laws of Alaska prescribes what the application for admission to the bar shall show, and prescribes the examination of the applicant. Section 1567 reads: "If, upon examination, the applicant be found qualified, the Court shall administer an oath to the applicant to support the Constitution and laws of the United States and of the District, and to faithfully and honestly demean himself or herself in office. The Court shall direct an order to be entered to the effect that the applicant is a citizen of the United States and of the District, of the age of twenty-one years, of good moral character,

and possessed of the requisite learning and ability to practice as an attorney in all the courts of the District, and has taken the oath of office; and upon the entry of the order and payment of the legal fee he or she is entitled to practice as such attorney, *and not otherwise.*" (*Italics ours.*)

These sections were amended by an Act of the Alaska Legislature, Session Laws 1915, Chapter 75. The first three sections prescribe a two-years course of study in the office of an Alaska attorney, registration of the applicant, etc. Section four provides for the admission of those who have within the three years next preceding the application for admission, taken a course in an accredited law school. None of these provisions are material to the question here involved.

Section five reads as follows: "Whenever an applicant for admission to practice law in this Territory as an attorney and counsellor shall present to the District Court a certificate from a Judge of the highest court in any State or Territory of the United States, showing the applicant to have been duly admitted to practice law as an attorney and counsellor in the highest Court of such State or Territory, or in any one of the district courts or the Supreme Court of the United States, and that he has practiced therein as such an attorney for a period of five years continuously immediately prior to the date of his application, and that he is in good standing in such Court of said State or Territory or other Court, such applicant may be admitted to practice law as an attorney and counsellor in this Territory without further examination."

Section seven repeals all "Acts and parts of Acts *inconsistent with this Act.*" (*Italics ours.*)

Thus stood the law at the time the contract was made for professional services between plaintiff and

Tuppela. When plaintiff should have been duly admitted, taken the oath, etc., he could practice as an attorney "and not otherwise." Now, plaintiff was first admitted to practice in the courts of Oregon in July 1915. (Rec. pp. 331.) By no possibility then could he become qualified to be admitted to the Alaska bar prior to July 1920, or some two years and a half after he made the contract. In fact, he never became a member of the Alaska bar. Either through ignorance or design then, the plaintiff had inveigled John Tuppela—this old illiterate prospector—into a contract which it was impossible for the plaintiff to perform. The promises contained in the contract then on the part of Tuppela were without consideration and void.

The authorities upon this question, to the honor of the profession, are not very numerous, but wherever the question has arisen the courts have not hesitated to pronounce such contracts absolutely void and incapable of being the basis of an action either on the contract or on quantum meruit.

(6 Corp. Jur. 721.)

Thornton on Attorneys at Law, Vol. 1, p. 25.

Hitson vs. Brown, 3 Col. 304.

Bochman vs. O'Reilly (Col.) 24 Pac. 548.

Tedrick vs. Hines, 61 Ill. 189.

Ames vs. Gilman, 10 Metc. (Mass.) 239.

The learned trial judge seems to have been impressed with these authorities, and the reasons upon which they are grounded, for he charged the jury that "if the plaintiff was not authorized to practice the profession of attorney-at-law in the Territory of Alaska at the time of entering into such a contract, he would not be qualified to perform the professional services required by said contract, and if that were so, without any other stipulation being entered into

in said contract, it would be a defense to said action.” (Rec. p. 307.)

The Court, however, further instructed the jury: “But if you further find from the evidence that the defendant Tuppela, who entered into said contract of employment with the plaintiff, was informed of such fact of plaintiff not being authorized to practice in Alaska at the time of entering into said contract, and that such contingency, with the knowledge and consent of the said Tuppela, was provided for in said contract by authorizing the plaintiff to associate competent counsel, authorized to prosecute the contemplated proceedings, suits or actions with the plaintiff, and without expense to the defendant Tuppela, then the fact that the plaintiff was not authorized to practice law in the Territory of Alaska would be no defense to this action, and if you so find, you will not further consider said defense.” (Rec. p. 307-8.)

To this instruction defendants excepted. (Rec. p. 325.) There are several errors in this instruction. In the first place, it is not the law. A contract for services of an attorney is a contract for *personal service of that attorney*. The attorney cannot therefore, except by consent of his client, delegate the performance of the service to another. 6 Corp. Juris 668. And the fact that the attorney has in his contract with his client stipulated for the right to employ associate counsel does not relieve him of his obligation to render his own professional services personally. That is the gist of what the client has contracted for. Second, there was not a scintilla of evidence that John Tuppela, at the time he entered into the contract “was informed that plaintiff was not authorized to practice in Alaska, and that contingency was provided for in the contract with the knowledge and consent of Tuppela by the insertion of the clause permit-

ting the plaintiff to employ associate counsel." Nor did the clause in the contract itself provide for the employment of associate counsel "authorized to prosecute the contemplated proceedings," etc., as the Court erroneously assumed that it did. Third, the stipulation permitting the plaintiff to employ associate counsel was purely optional with him. Tuppela had no right under the contract either to insist upon, or object to the employment of associate counsel. The contract by its terms was just as binding upon Tuppela whether plaintiff employed associate counsel or not, *and he never did employ associate counsel.* Rec. p. 135.

Third. The evidence wholly fails to show that plaintiff was ever discharged by John Tuppela, either wrongfully or otherwise. Without the allegation and proof of this as a fact, the second cause of action set out in the complaint must wholly fail. The action is based and bottomed upon that proposition. But the Court submitted that question to the jury in the instructions complained of which were given and excepted to. The undisputed evidence upon this point is that of the plaintiff. Tuppela's lips were sealed by insanity.

In his direct examination plaintiff's counsel called his attention to the letter of J. H. Cobb of August 5, 1920, and asked:

Q. Mr. Matheson, I call your attention to the statement made by Mr. Cobb in that letter, in which he says that, "Mr. Tuppela states that after the contract was made, and after waiting on you for several months to begin action, he notified you that the contract was at an end for your failure to act." I ask you to state, Mr. Matheson, what, if any, notification John Tuppela, or anyone in his behalf, ever gave you that this contract between you and Mr. Tuppela was

at an end on account of your failure to act, or on any other account whatsoever?

A. There was no statement made to me to that effect, or in any way to this day, excepting what he says in the answer to the complaint. (Rec. p. 110.)

How and when then was plaintiff discharged? *There is absolutely nothing in the record to show.* According to the complaint and the evidence of plaintiff there was no discharge prior to September, 1918; although during this six months period plaintiff had done nothing to carry out his contract of employment, and could give no tangible reason for his failure. Tuppela was still patient, though if he had been a man of ordinary intelligence or exercised ordinary care, he unquestionably would have discharged him.

Two sets of circumstances in evidence induced the learned trial judge to deny the defendant's motion for an instructed verdict for failure of proof on this point, and to submit the question of discharge to the jury, namely: the failure of Tuppela to write to plaintiff after he left Astoria for Alaska, about September 1, 1918, and Tuppela's employment of other counsel in May, 1919.

The testimony bearing upon the above matters is, in substance, as follows: From the time of the signing of the contract sued upon, March 11th, 1918, till about the first of the following September, Tuppela remained in, or in the vicinity of, Astoria, Oregon, (Rec. 73,) although an abortive effort was made for him and plaintiff to come to Alaska in July (Rec. 77-78). About the 28th or 29th of August, 1918, Tuppela left Astoria for Alaska, plaintiff furnishing him \$25.00, and Tuppela said he had \$300.00 due him from an Alaska miner then fishing in Astoria. (Rec. 82-83.) Tuppela was to go to Alaska, get certain papers and interview and get the addresses of certain per-

sons and send the papers and addresses of the witnesses to plaintiff at Astoria, and plaintiff was to get in touch with them and find out what they would testify to. The relations between plaintiff and Tuppela were friendly up to this time, and plaintiff was willing to go on with his contract. (Rec. 83-4.) After Tuppela left for Alaska, plaintiff never heard from him directly or indirectly, except that he heard from other parties that he had gone to Sitka, and in December he heard he was sick in a hospital with the flu. (Rec. 84-84.) Plaintiff hoped to hear from Tuppela in November. The reason he, (plaintiff,) didn't go to Alaska with Tuppela was, that he was too busy with other matters and it was the cheapest for both for Tuppela to go and furnish plaintiff with the facts. (Rec. 85.) When plaintiff failed to hear from Tuppela in November, 1918, plaintiff wrote him a letter in long hand in the Finnish language, directed to Sitka, Alaska, asking him if he had found the witnesses and papers, and whether he had been sick, and that he write to him. (Rec. 86-89.) To this letter he received no reply and the letter was never returned to him.

Sometime later plaintiff heard that Tuppela had employed other counsel in Alaska, and about March 1, 1919, he wrote him a letter in long hand in the Finnish language, directed to Juneau, Alaska, asking him if he had retained another attorney, and to write to him, plaintiff. This letter was never answered, and was never returned. (Rec. 94-6.) In the summer of 1919 plaintiff received the following letter: "J. H. Cobb, Juneau, Alaska, July 17th, 1919.

Mr. Enoch E. Matheson,

Astoria, Oregon.

Dear Sir:

Mr. John Tuppela says he left with you, in March

last, a lot of papers pertaining to certain mining claims near Chichagoff and Sitka, Alaska. These papers he now needs. Will you please send them to me or to John Tuppela, Juneau, Alaska.

Very truly yours,
J. H. COBB."

(Rec. 97.)

Upon receipt of this letter plaintiff wrote to John Tuppela, in long hand, in the Finnish language, directed to Juneau, Alaska, in substance that he (plaintiff) had received a latter from J. H. Cobb, of Juneau, and that he (Tuppela) had never sent plaintiff the papers that he went after, and again asking him if he had retained an attorney here, "as I had been informed previously, and had written him previously, to let me know so that I could act accordingly." (Rec. 98-99.) Plaintiff received no reply to this letter. Plaintiff was afterwards informed that Tuppela had retained other counsel and had the case in Court, "and couldn't do anything so far as that case was concerned." (Rec. 100.)

There was no evidence of any other step taken by plaintiff until Feb. 20th, 1920, over six months, when he wrote to the clerk of the District Court at Juneau, as follows:

"Would you kindly inform me whether or not there is a case pending in your Court wherein John Tuppela is plaintiff against a certain mining company at Chichagoff or Sitka, Alaska, or whether he has had any case pending there within the last two years or so.

Thanking you for an early reply, I remain," etc. (Rec. 101.)

To this letter the Clerk on March 3rd, 1920, replied as follows:

"Enoch E. Mathison, Esq.,
"Attorney at Law,

“Astoria, Oregon.

“Dear Sir:

“Your letter of February 20th at hand, and in reply to your inquiry therein, I would say that an equity suit was begun on May 10, 1919, by John Tuppela, plaintiff, against the Chichagof Mining Company, a corporation, defendant. The plaintiff’s attorneys are John R. Winn and J. H. Cobb, both of Juneau. The defendant is represented by H. L. Faulkner of Juneau, and former Supreme Court Justice (88) O. G. Ellis, of Tacoma, Wash.

“The relief prayed for in the complaint was, among other things, that plaintiff be decreed to be the owner of an undivided one-half interest in certain lode claims situated at or near Klag Bay on the west side of Chichagof Island, Alaska; that an accounting be rendered plaintiff for the gold extracted from these claims, and that, pending the final determination of the suit, a temporary injunction issue.

“The trial began on November 20, 1919, was concluded on November 29th, and taken under advisement.

“On February 25th, 1920, a decree was entered, dismissing the complaint.

“Yours truly

“J. W. BELL,

“Clerk.

“By John T. Reed,

“Deputy.”

At the same time plaintiff wrote the Clerk he also wrote to J. H. Cobb, the following letter:

“February 20, 1920.

“Mr. J. H. Cobb,

“Juneau, Alaska,

“Dear Sir:

“Last summer you wrote me a letter regarding the

whereabouts of John Tuppela, and asking for certain papers he may have left with me. The letter was lost and I have just found the same. Would you kindly let me know whether he is in Juneau or not, or whether you know of his whereabouts, as he has some matters pending here which he had neglected to complete.

“Respectfully yours,

“ENOCH E. MATHISON.”

(Rec. 104.) To this letter plaintiff received no reply. (Rec. 105.)

The plaintiff did nothing more until July 7th, 1920, when having seen in the newspapers that the U. S. Circuit Court of Appeals had reversed the case of Tuppela vs. Chichagoff Mining Co., and rendered judgment for Appellant (Rec. 143) he wrote to John Tuppela as follows:

“Mathison & Mannix,

“Attorneys at Law,

“Astoria, Oregon, July 7, 1920.

“Mr. John Tuppela,

“Juneau, Alaska,

“Dear Sir:

Information has been brought to me to the effect that you were successful in the legal proceedings instituted by you against the Chichagof Mining Corporation, arising out of matters in connection with the contract you entered into with me, hereinafter more particularly mentioned. Previously, after receiving information that you probably were located at Juneau, Alaska, I wrote you several letters to substantiate that fact, but received no reply from you. I have endeavored to get in touch with you since the summer of 1918, so that I could proceed with the litigation, but no one seemed to know where you went to. On March 3, 1920, in answer to my inquiry, I re-

ceived a communication from the Clerk of the United States District Court at Juneau, Alaska, to the effect that you had started these proceedings, but outside of these two sources of information I have not received any information as to what you were doing in the premises.

“I am writing this letter for information. I call your attention at this time specifically to the fact that on the 11th day of March, 1918, you entered into a contract with me, the same being in writing, and by the terms of said contract you retained me as your attorney to prosecute your claims against this particular corporation, or any other parties holding adverse to you, in the matter of those certain mining claims which appear to have been the subject-matter of the litigation referred to hereinabove. By the terms of this (92) agreement I was empowered to proceed with all matters pertaining to your interest in said mining claims, and the rate of compensation which I was to receive was clearly set forth in said contract, you retaining a copy of the same. At this time I respectfully request that you examine said contract and then communicate with me as to what you will do in the matter of compensating me for the work which I did under said contract and for the damage which I suffered because of the breach of said contract on your part.

“I do not propose in this letter to recite the work which I did in your behalf after the execution of said contract as that is beyond the purview of this letter, and you personally know concerning the large amount of the work which I did on your behalf, but I wish at this time to state that I am able to conclusively show that I was at all time ready, able and willing to fully carry out all the terms of said agreement to be kept and performed on my part, and that

you, shortly after the execution of this agreement, failed to keep your part of the same and left for parts unknown to me, thus rendering it impossible for you to properly conduct your case in accordance with the terms of said agreement.

“As stated before, I will not undertake to rehearse all the facts in relation to the matter at this time, but request that you give this matter your early and earnest consideration to the end that any litigation may be avoided and a prompt and satisfactory settlement arrived at.

“Trusting to hear from you at an early date, I remain,

“Very truly yours,

“ENOCH E. MATHISON.”

(Rec. 106-8.)

Plaintiff received no answer to this letter from Tuppela, but did receive the following from J. H. Cobb:

“Juneau, Alaska, August 5, 1920.

“Mr. Enoch E. Mathison,

“305 Spexarth Bldg.,

“Astoria, Oregon.

“Dear Sir:

“Mr. John Tuppela received your letter of July 7, today, and I have carefully read it to him. He has also shown me a duplicate original of the contract you mentioned, dated March 11, 1918. Mr. Tuppela states that after the contract was made and after waiting on you several months to begin action, he notified you that the contract was at an end, for your failure to act.

“Mr. Tuppela employed Judge John R. Winn to bring a suit to recover his property, in May, 1919. Judge Winn associated me with him. We brought the suit and were ultimately successful. However, the

lower Court held against us, and one of the grounds of its decision was that Tuppela was guilty of laches, in waiting so long (17 months) to bring his suit. Also in July, 1919, I wrote you asking for any papers Tuppela might have left with you. To this letter I never had the courtesy of an answer.

“Under these circumstances, I wholly fail to see how you have any rights under your contract. On the other hand, if (94) the United States Circuit Court of Appeals had affirmed the ruling of the lower court on the question of laches, Tuppela would probably have had a serious action against you for negligence.

“Very truly yours,
“J. H. COBB.”

To this letter plaintiff made no reply (Rec. 143) and fourteen months thereafter, and after he had learned that Tuppela had again become insane, (Rec. 144) though he denied it till his attention was called to his complaint, he brought this suit.

Plaintiff also testified that he made no objection to the employment of other counsel by Tuppela, (Rec. 129) and that after he received the letter from the Clerk of the Court informing him that Tuppela had lost the case in the lower Court he made no effort to redeem the situation such as offering to join, or aid in the appeal. (Rec. 133.)

The evidence also shows, that Tuppela was an old, ignorant prospector, unable to read or write the English language at all, or to write or read writing in any language. (Rec. 246.) Plaintiff knew that Tuppela couldn't read English (Rec. 142) but he had an “impression” that he could read Finnish writing. (Rec. 161.) After reaching Alaska in 1918 Tuppela was utterly penniless, and was supported for a time by Judge Winn, and some Finns, and early in March,

1919, had to be sent to the Pioneers House, a charitable institution maintained by the Territory, where he remained until May, 1919, when on May 9th, 1919, he entered into a contract with J. R. Winn and J. H. Cobb to bring suit for him against the Chichagoff Mining Co. (Rec. 247, 349.)

We confidently assert that there is nothing in all this showing or tending to show a discharge of plaintiff by Tuppela or any breach of the contract on the part of the latter. The most that it shows is that because Tuppela was not as active and alert in attending to his case as plaintiff desired and conceived he should be, the plaintiff neglected Tuppela's case for some fourteen months, neither attempting to settle (Rec. 124) nor filing the suit until Tuppela, apparently despairing of the plaintiff employed other counsel. Plaintiff when pressed on cross-examination as to what prevented him from carrying out or attempting to carry out his contract during the fourteen months elapsing from the time it was made until the employment of other counsel *made no claim that it was because he was discharged*, but apparently attempted to sum up his case. When asked: "Was there anything after the contract was signed and prior to the time that the suit of Tuppela against the Chichagoff Mining Co. was filed in this Court, about fourteen months lacking nine days, was there anything to prevent you from associating counsel with you up here?"

His answer was: "Oh yes!"

Q. What?

A. Tuppela's actions himself.

Q. Tuppela's actions in coming up here to look after his case?

A. He didn't comply with my instructions or his part of the contract in getting the information and

getting the papers and writing me, or coming back and making a report.”

Obviously this answer imputes a term in the contract which is not there, namely, that Tuppela was under contract to get information and papers, and write to the plaintiff and return and make a report. Eliminating that the gist of the answer is that Tuppela’s failure to comply with plaintiff’s instructions was the sole reason for his failure to take the first step to carry out the contract on his part.

But negligence of the client is not a discharge of the attorney, though it may justify the attorney’s withdrawal.

Brown vs. Goll, 62 So. Rep. 154.

Welch vs. Shumway, 65 Ill. 473.

And surely the rule would apply with peculiar force in the case of a client like Tuppela, old, infirm, just released from three and a half years’ confinement in an asylum, penniless and so ignorant as to be unable to read or write.

Other counsel was employed by Tuppela in May, 1919, though plaintiff claims to have heard of it before that. Indeed he seems to have been expecting it, which was certainly reasonable.

But employment of other counsel does not operate as a discharge of counsel first employed, unless such counsel has good cause to object and does object thereto.

Ruling case Law, Vol. 3, 30, p. 958.

Temey vs. Berger, 93 N. Y. 524.

Plaintiff knew at the time or shortly after of the employment of Winn and Cobb, and made no objection whatever thereto. His actions throughout were those of one who had no further interest in the matter.

The proof then, so far from showing a discharge of

plaintiff by Tuppela, merely showed that plaintiff because of Tuppela's failure to carry out his instructions or co-operate with him as fully as he deemed proper, abandoned his employment. And in that case he cannot recover.

Thornton vs. Attorneys, vol. 2, 735.

Cahill vs. Baird, 70 Poe, 1061.

Walsh vs. Shumway, 65 Ill. 473.

FOURTH: Conceding for the sake of the argument, however, that plaintiff was discharged by the defendant Tuppela, was the latter justified in so doing? We submit that the proof shows conclusively that he was. The facts have been fully stated under the next preceding head of this brief, and will not be repeated here except to call attention to certain outstanding facts. Plaintiff was employed March 11, 1918. He neither filed the suit, nor made any effort to settle or compromise *at any time*. There was nothing to prevent his proceeding to perform his contract in March, April, May or June following. He did attempt to come to Alaska with Tuppela in July, but after Tuppela started plaintiff called it off because he was busy. There was nothing to prevent his acting in August, September, October, November or December, 1918, or in January, February, March or April, 1919, except Tuppela's conduct in not returning to Astoria. But Tuppela was first sick in a hospital in December, 1918, and then had to be sent to the Pioneers Home as a pauper, till May, 1919. And the suit had to be filed in Alaska if filed at all. Here then, was negligence on the part of the plaintiff, especially in view of the nature of the case, and the condition of his client, so gross as to be almost criminal, and sufficient at least for disbarment.

According to the uncontradicted evidence (Testimony of Wickirsham, Rustgood and Roden (Rec.

pp. 223-240) such a suit, in the exercise of ordinary care on the part of an attorney of ordinary skill and prudence, should have been brought in from thirty to ninety days after the employment. Tuppela waited fourteen months, lacking three days, before employing other counsel. He waited six months in Astoria, before doing anything of which plaintiff can even find complaint. How much longer should he have waited? Till his rights were barred by laches? Till his mine was exhausted and the defendant company liquidated? We submit that as matter of law the Court should have held plaintiff barred from recovery by his own negligence.

6 Corp. Juris 722.

Thorn vs. Beard, 32 N. E. Rep. 140.

But the Court accentuated this error in the instructions given and here complained of. After the jury had retired and considered the case awhile, they returned into Court, and propounded the following questions:

1. "If the jury find that there was laxity or fault on part of both parties to suit, for whom should the verdict be rendered on the second cause of the complaint?"

2. "If the jury finds that there was a laxity on both plaintiff and defendant in living up to the terms of the contract, but that the plaintiff had performed legal services, should the jury find damages for the plaintiff on the second cause of the complaint to the extent of the services performed?"

3. "If the jury find that there was laxity or fault on the part of both parties to suit, but unequal in degree, how should a verdict be rendered on the second cause of the complaint?" (Rec. p. 325-6.)

In answer to the questions the Court gave the in-

structions complained of in assignment IV and V, and defendants excepted, (Rec. 336-331) on the specific ground that there were not sufficient facts and circumstances in evidence in connection with Tuppela's conduct or alleged conduct to justify the question of discharge going to the jury.

Tuppela had been insane, was of weak mentality, and has just gone insane again; but he was not so insane in 1918 as not to be dissatisfied with plaintiff's gross neglect to file his suit, or take any steps whatsoever to comply with his contract of employment. He would have been insane indeed not to have ignored the plaintiff and employed counsel qualified to act, and who could and who would and did bring his suit and protect his rights.

FIFTH: Plaintiff has mistaken his remedy, and neither the pleadings nor the evidence sustains the verdict and judgment on the second cause of action.

Plaintiff sued in his first cause of action, for the value of the services he claimed to have rendered; in his second cause of action, for the value of his contract, which he alleged was wrongfully broken by Tuppela. At the beginning of the trial, plaintiff elected to go to trial on his second cause, realizing evidently his inability to prove that he had rendered any service of any value to Tuppela.

It is our contention that where an attorney is employed on a contingent fee, and wrongfully discharged before the fee is earned, his only remedy is a suit on quantum meruit for the value of the services rendered; that this rule necessarily results from the nature of the employment and the relation of trust and confidence that must exist between attorney and client; that where a client for any reason, or no reason, has become dissatisfied with his attorney, he has a right to discharge him upon payment for the ser-

vices rendered and employ another; and that it is against public policy for the law to penalize the client in such a case, by holding him further liable for what the attorney might have earned under the contract.

We are aware that the authorities are divided upon this proposition, but we think the better and true rule is that announced in the recent case of *Ramey vs. Graves et al.*, 191 Pac. 801, by the Supreme Court at Washington, as follows:

“Where the attorney’s compensation is contingent on the successful prosecution of a suit, and he is discharged or prevented from performing the service, the measure of damages is not the agreed contingent fee, but reasonable compensation for the services actually rendered, and in the absence of evidence of such reasonable value there can be no recovery.” In support of this proposition the Court cites:

6 Corp. Juris 725.

Pratt vs. Kearns, 123 Ill. app. 86.

Josephs Adm’r vs. Lapps Adm’r., (Ky) 78 S. W. 1119.

Western Un. Tel. Co. vs. Summers et al., 73 Md. 9, 20 Atl. 129.

Harris Adm’r vs. Root et al., 28 Mont. 159, 72 Pac. 429.

French vs. Cunningham et al., 149 Ind. 632, 49 N. E. 797.

“The law is well settled that a client has the right to discharge his attorney at any time either with or without cause; and this is true, although the motion for permission to substitute is resisted by a person claiming to be the assignee of the interests of such party, where there is a controversy as to such assignment. The relation between attorney and client is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute con-

fidence in either the integrity, the judgment, or the capacity of the attorney." 6 Corp. Juris 676-7.

"This right of discharge exists even though a contingent fee has been agreed upon." 6 Corp. Jur. 677.

The authorities cited fully sustain the text above quoted. If this be the law, then the rule we contend for necessarily follows. For "Every attorney enters into the service of his client subject to the rule that his client may dismiss or supersede him at will; and if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full knowledge that he may never perform such service for the reason that his client may not keep him, and that in that event he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered."

Johnson vs. Ravitch, 113 App. Div. 810, 812, 99 N.Y.S. 1059.

The plaintiff neither alleged nor proved the value of the service he rendered. The Court refused to instruct on this issue, but instructed the jury that the measure of the plaintiff's recovery was what he would have earned had he successfully prosecuted the suit, less the reasonable value of the services he would have had to perform to carry out his contract. This was manifest error.

In conclusion we respectfully submit that the judgment below must be reversed, because:

FIRST: There is nothing in the pleadings or evidence to support the verdict and judgment against J. H. Cobb as Trustee.

SECOND: Plaintiff was not admitted to practice in the courts of Alaska, at the time he made the contract sued upon; was not qualified to be admitted; and has never been admitted.

THIRD: There was no evidence to sustain a finding that plaintiff had been discharged wrongfully or otherwise, the evidence merely showing an abandonment by plaintiff. *But*

FOURTH: If plaintiff was discharged by Tuppela such discharge was fully justified by plaintiff's failure to either file the suit contemplated in the contract, to either settle or attempt to settle with the Chichagoff Mining Company, or in fact, do anything whatsoever under his contract.

FIFTH: Plaintiff's remedy for a breach of the contract alleged is a suit on quantum meruit only and not for the value of the contract to him.

Respectfully submitted,

J. H. COBB,
Attorney for Plaintiffs in
Error, and Guardian ad litem
for John Tuppela.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN TUPPELA, J. H. COBB as Trustee for
John Tuppela, and GROVER C. WINN as
Guardian of the person of John Tuppela,
Plaintiffs in Error,

vs.

ENOCH E. MATHESON,
Defendant in Error.

Brief for the Defendant in Error.

**Upon Writ of Error from the District Court for
Alaska, Division Number One.**

R. E. ROBERTSON,
ENOCH E. MATHESON,
Counsel for Plaintiff and
Defendant in Error.

IN THE
United States
Circuit Court of Appeals
For the Ninth Circuit

JOHN TUPPELA, J. H. COBB as Trustee for John Tuppela, and GROVER C. WINN as Guardian of the person of John Tuppela. Plaintiffs in Error.	} No. 3973.
vs.	
ENOCH E. MATHESON, Defendant in Error.	

**Upon Writ of Error from the District Court for
Alaska, Division Number One.**

Brief for the Defendant in Error.

STATEMENT OF FACTS.

In this brief throughout the plaintiffs in error will be designated as the defendants, which was their status in the lower court, and the defendant in error will be designated as the plaintiff, which was his status in the lower court.

Complaint.

Originally the complaint stated three causes of action, but inasmuch as the plaintiff on the trial selected the second cause of action, as between the first and second causes of action, as the one upon which to go to trial (P. R. p. 44), nothing more, except perhaps inferentially, will be said about the first cause of action.

The second cause of action (P. R. pp. 10-17) is for damages suffered by plaintiff by reason of the defendant Tuppela's having breached a contract (P. R. p. 333) that was entered into on March 11, 1918, by said Tuppela and the plaintiff, and alleges inter alia that the plaintiff was a duly licensed and qualified attorney (P. R. p. 10); that the defendant Tuppela on August 19, 1920, conveyed all of his right, title and interest in and to all of his property to the defendant Cobb in trust, subject only to certain reservation enumerated therein, and that said Cobb accepted said trust and ever since had been acting as trustee (P. R. p. 10); that the defendant Tuppela was pronounced insane on July 28, 1921, and that the defendant Winn was duly appointed as guardian and had ever since continued to act as said guardian, (P. R. pp. 10 & 11); the terms of said contract (P. R. pp. 11, 12 & 13); that plaintiff faithfully and diligently performed the covenants of said agreement to be borne by him and performed legal services that extended over a period of five months (P. R. p. 13); that the defendant Tuppela breached

said contract without justification and prevented its performance by plaintiff (P. R. pp. 14 & 15); that the defendant Tuppela's claims were successfully prosecuted by other counsel whom he employed in violation of his agreement with plaintiff, and that as a result thereof the said defendant Tuppela recovered certain interests in certain mining claims and also the sum of \$300,000.00 cash (P. R. pp. 15 & 16); that these claims were the same as the claims mentioned in the agreement between the plaintiff and Tuppela (P. R. p. 16); that the services rendered to Tuppela by the plaintiff were of great value, and that the contract of March 11, 1918, was of great value to the plaintiff, and that by reason of Tuppela's breaching said contract the plaintiff was damaged (P. R. pp. 16 & 17).

The third cause of action in substance is that the plaintiff at the special instance and request of the defendant Tuppela advanced and loaned to him, between March 11, 1918, and August 30, 1918, the sum of \$362.50, no part of which has been repaid (P. R. pp. 17, 18 & 19). At this time we call attention to the fact that no appeal has been taken, nor any error assigned other than possibly the first assignment (P. R. p. 362), to the judgment in favor of the plaintiff on the third cause of action.

SECOND AMENDED ANSWER.

The defendants went to trial upon the second amended answer which contained six af-

firmative defenses. The first in substance set forth that the plaintiff is not admitted to practice in the courts of Alaska, and that suit was contemplated in the agreement between plaintiff and Tuppela to be brought in the name of Tuppela against the Chichagoff Mining Company and that such suit was to be brought in the District Court of Alaska (P. R. pp. 26 & 27).

The second affirmative defense set forth in the alternative that, if defendant Tuppela had discharged plaintiff as his attorney, that said discharge was justified by the plaintiff's alleged gross negligence relative to not instituting suit (P. R. p. 27). This defense contained no allegations that the defendant Tuppela had in any wise been damaged by any alleged negligence of the plaintiff.

The third affirmative defense sets forth that plaintiff obtained the contract into which he and the defendant Tuppela entered, by practicing fraud and imposition upon the defendant Tuppela (P. R. pp. 27, 28 & 29).

The fourth affirmative defense sets forth an alleged estoppel of the plaintiff to claim anything under said contract by reason of certain alleged misconduct by which Tuppela was induced to employ and pay other counsel to prosecute said suit (P. R. pp. 29, 30 & 31).

The fifth affirmative defense sets forth that the defendant Tuppela justifiably discharged plaintiff by reason of certain alleged

gross negligence of the latter relative to failure to bring any suit or otherwise prosecute Tuppela's claims (P. R. pp. 31 & 22). This defense does not, as we read it, set forth that Tuppela suffered any damage by reason of any alleged negligence of the plaintiff.

The sixth affirmative defense goes only to the third cause of action and is in an alternative form to the effect that if the plaintiff advanced or loaned the moneys claimed they were only to be repaid upon the successful termination of a suit to be brought and instituted by the plaintiff, and that plaintiff did not bring or prosecute such suit, and that the advancement of said moneys was of no benefit to said Tuppela (P. R. p. 32).

REPLY.

The plaintiff replied to the first affirmative defense and denied all of it except he admitted that it was in his and Tuppela's contemplation to prosecute to final determination said Tuppela's claims by such action, **legal or otherwise**, as might be neecessary, and that plaintiff had never been admitted to practice in the courts of Alaska (P. R. p. 37).

Plaintiff replied to the third affirmative answer and denied each any every part thereof, except he admitted that Tuppela became insane in 1913 and was sent to Morningside Asylum for treatment and that he was discharged therefrom on or about December 17,

1917, and that plaintiff is and has held himself out as an attorney at law for many years, and Tuppela, after his discharge from the asylum was desirous of finding an attorney to bring suit on his behalf to recover certain mining claims and other property from the Chichagoff Mining Company, and that on or about March 11, 1918, plaintiff and defendant Tuppela entered into the contract that was placed in evidence in the trial of the case (P. R. p. 38).

Plaintiff in his reply denied in toto the allegations of the second, fourth, fifth and further (i. e., sixth) affirmative defenses (P. R. pp. 37, 38 & 39).

VERDICT AND JUDGMENT.

The case was tried before a jury which on November 13, 1922, returned a verdict in favor of the plaintiff on the second cause of action for \$2,500.00 and, on the third cause of action, for \$362.50 (P. R. p. 41), on which verdict judgment was entered on November 18, 1922 (P. R. pp. 40, 41 & 42).

ARGUMENT.

In discussing the law applicable to this case we shall follow the order of the argument set forth by the defendants in their brief on page 12, although we may in some cases restate the propositions in a different form than the set forth by defendants on said page of their brief.

First.

The first proposition submitted by the defendants is in the exact language as used by them, to be found in their motion for an instructed verdict upon the second cause of action, made at the close of the case which reads as follows: "There is nothing in the pleadings or the evidence to sustain a verdict against the defendant J. H. Cobb, as trustee for John Teppela." (Brief for Plaintiffs in Error, p. 7; P. R. pp. 284 & 285).

Although not desiring to quibble, we submit that the proposition so actually brought to the attention of the trial court is somewhat different than the proposition that is now urged that "neither the pleadings nor the evidence tended to show any liability to the plaintiff on the part of the defendant J. H. Cobb, as trustee for John Tuppela." (Brief for Plaintiffs in Error, p. 12).

A clear distinction, we think, if necessary could be readily made between these two propositions. Although the defendants amended their answer twice in the case and went to trial upon their second amended answer (P. R. p. 22), there is no record of their ever having raised any objection to either a nonjoinder or misjoinder of parties defendant unless at the close of the trial their motion for a directed verdict should be construed to raise that point. (P. R. p. 284).

The authorities are unanimous that it is too late to make such objection at the trial. This court has so held in a case arising in the same jurisdiction and under the same laws as were in effect at the trial of this action.

“An objection for nonjoinder or misjoinder of parties is too late when made for the first time at the trial of the case.”

Mackie v. Fox, 121 Fed. 487.

There are numerous other decisions which are in consonance with the opinion of this court, but we simply make reference to them without quoting therefrom:

Osborn v. Logas, 42 Pac. (Ore.) 997;

Cohn v. Ottenheimer, 10 Pac. (Ore.) 20, 22;

Wolf v. Eppenstein, 140 Pac. (Ore.) 751, 754;

In re Youngs Estate, 126 Pac. (Ore.) 992, 993;

Bohn v. Wilson, 101 Pac. (Ore.) 202, 204.

The defendants speculated on the chances that if the defendant Cobb were left a party defendant and a verdict should result adversely to the plaintiff, they or he could plead *res judicata* to any suit subsequently brought against him as trustee by plaintiff. The turn of the wheel having gone against them in that speculation, defendants are in poor grace to assert that the judgment should be reversed on that ground and the plaintiff required to retry

the suit as against the defendants Tuppela and Winn.

Momentarily assuming for the sake of the argument that no judgment should have been returned against the defendant Cobb, still such concession would not warrant the reversal of the judgment. Section 1067, Comp. Laws of Alaska, 1913, provides:

“Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side as between themselves.”

Under this statute, if in fact Cobb is not liable, but the other two defendants are, judgment could be rendered against Tuppela and Winn regardless of whether or not judgment were rendered against Cobb. The Oregon Supreme Court in considering the Oregon statute, from which the Alaska statute was undoubtedly adopted said:

“If A. were to sue B., C. and D. upon a joint obligation upon which they were all liable, and were all served with summons, he could not recover against any of them severally. He must recover against all or none; but, if it should appear that either of them was not a joint obligor, he could recover against those who were, the same as

though he had sued them alone. It is not shown in the complaint that Peter Donohue was ever liable upon the contract in suit, and consequently he or his representatives could be dropped out of the case any time, and it would not affect the others. They could be recovered against the same as if they had been sued alone."

Fisk v. Henarie, 13 Pac. (Ore.) 193, 194.

In a later case the Supreme Court of Oregon ordered judgment entered against certain parties who had been erroneously dropped from the proceedings.

N. P. Lumber Co., v. Spore, 75 Pac. (Ore.) 890, 896.

Under a similar statute the Idaho Supreme Court has held to the same effect:

"Under this section the action does not abate upon the failure of the plaintiff to make out a case of joint liability but the defendants against whom liability is not shown should be dismissed from the action, and judgment rendered against the defendants shown to be liable."

Parrott v. Twin Falls Etc. Co., 188 Pac. (Idaho) 451, 452.

We also refer to:

Sabin v. Mitchell, 39 Pac. (Ore.) 635, 636;
Ah Lep v. Gong Chov, 9 Pac. (Ore.) 483,
487.

It would appear that J. H. Cobb was a proper party to said action. The agreement entered into between Cobb and Tuppela not only conveyed all of Tuppela's property to Cobb in trust, but provided further that, in the event J. H. Cobb should not survive Tuppela, E. L. Cobb, the son of J. H. Cobb, should be the latter's successor (P. R. pp. 351 to 355). The third provision of that agreement specifically provided that said Cobb should hold said property in trust for the following uses and purposes, to-wit:

"To pay out of the proceeds of said property, and moneys received by him, all debts due and owing or to become due and owing by me, including the compensation that may become due to him for services as my attorney in the case of John Tuppela versus Chichagoff Mining Company under the contract now existing between us for such services." (P. R. p. 352).

It will scarcely be urged that the defendant Cobb neither has nor claims an interest in the controversy adverse to the plaintiff. If such contention be made, it is strange that a disclaimer was not filed in the action. Having such an interest in the controversy, the plaintiff had a right to make him a party defendant under Sec. 870, Comp. Laws of Alaska, 1913, which provides that:

"* * * Any person may be made a defendant who has or claims an interest in the

controversy adverse to the plaintiff, or who is a necessary party to the complete determination or settlement of the question involved therein."

Was it not requisite for the plaintiff to make the defendant Cobb a party because of the fact that as trustee of Tuppela's property he was united in interest with Tuppela in defeating the plaintiff's claim? Section 871, Comp. Laws of Alaska, 1913, provides that:

"Of the parties to the action who are united in interest must be joined as plaintiffs or defendants; * * * "

Defendant's contention that Cobb was not a proper party or that judgment should not be rendered against him must, if logical, be based upon the theory that some right of his as trustee has been infringed upon which would have been protected if such procedure had not been followed. Such a contention appears not logical but, on the contrary, absurd when the fact is considered that the trustee agreement between Cobb and Tuppela specifically directs Cobb to pay all debts due and owing or to become due and owing by Tuppela. The duty is thereby imposed upon Cobb to pay the judgment obtained by plaintiff against Tuppela, but defendants in effect say that they have been deprived of some right because the plaintiff has not put them, or at least Cobb as trustee, to the additional expense of defending a suit to compel him as trustee to pay the judgment obtained by plaintiff.

iff against Tuppela. Apparently the defendants would prefer the expense of two suits rather than to economize by having the matter entirely tried out in one suit.

Their objection does not go to the merits of the case, but relates more nearly simply to a desire to be obliged to defend two suits instead of one. Their position is very similar to that taken by the defendant in the case of *Benson v. Keller*, 60 Pac. (Ore.) 918, 920 & 921, in which the Supreme Court of Oregon said that "To put the plaintiff out of court could not better subserve the ends of justice than to determine the whole controversy now."

Second.

The second proposition advanced by the defendants is that "the plaintiff not being a member of the bar of Alaska had no capacity to perform the services stipulated in the contract and could not recover either on the contract or in quantum meruit." (Brief of Plaintiffs in Error, p. 12).

This proposition is urged upon the theory that plaintiff has never been admitted to practice in the courts of Alaska (P. R. p. 116), and that he was not admitted to practice in the courts of Oregon until July 9, 1915, (P. R. p. 331), and that he could not under the law have been admitted to practice in Alaska for some two years after the making of the contract be-

tween him and Tuppela on March 11, 1918 (Brief of Plaintiffs in Error, p. 13).

We are unable to subscribe to the contention that plaintiff could not have been admitted to practice in the courts of Alaska. Chapter 75, Alaska Session Laws, 1915, prescribes perhaps rather rigorous requirements before one may become a member of the bar of Alaska, but its provisions are not as severe as claimed by the defendants. The plaintiff is a graduate of the law school of the University of Oregon (P. R. p. 45), and was admitted to practice by the Supreme Court of Oregon on July 9, 1915 (P. R. p. 331) and in the United States District Court for the District of Oregon on November 22, 1915 (P. R. p. 332), and in the United States District Court for the District of Washington (P. R. p. 46), and he also practiced in the Supreme Court for the State of Washington (P. R. p. 49), and bears a good reputation as to ability and standing in the legal profession (See P. R. pp. 217 & 218).

Under these facts the District Court for the District of Alaska would not have hesitated to have admitted the plaintiff to practice under Section 3, Chapter 75, Alaska Session Laws, 1915, which reads as follows:

“That in any case where the applicant has taken a full course of legal study in any accredited school of law, as prescribed by said school, to be evidenced by certificate from such school, where the course of study

therein in not less than two years and is equivalent to that provided for by this act," (See Sec. 2 *idem*) "the Court may order the examination for admission to practice of the applicant without requiring the applicant to prepare therefor as herein provided, and provided such course of study has been within three years preceding his application for admission."

The burden of proving that plaintiff was

not qualified to be admitted as attorney before the courts of Alaska would, we assume without argument, fall upon the plaintiffs in error, but they entirely neglected to sustain that burden. Assuming, however, for the sake of the argument, that the plaintiff was and could not have been admitted to practice in the courts of Alaska, it is not a foregone conclusion that a suit that would have secured to Tuppela all the remedies to which he was entitled could not have been brought by him against the Chichagoff Mining Company in another jurisdiction than Alaska. The suit actually instituted and which was presented to this court (See 267 Fed. 753), was at least in part, in the nature of a suit for an accounting. The trial court by its instruction (P. R. p. 307) specifically held that the suit could only be brought in the Territory of Alaska. We have no wish to argue the point, but a serious question might be raised as to the correctness of such holding, and particularly so far as that suit was for an accounting, in

view of the doctrines announced by the Supreme Court of the United States in *Fall v. Eastin*, 215 U. S. 1, 54 Law Ed. 65, 23 L. R. A. (N. S.) 924.

However, be that as it may, the fact remains that there was a specific provision in the agreement between the plaintiff and Tuppela that the former might associate any other attorney or attorneys with him as associate counsel in all matters therein (P. R. p. 335). Moreover, plaintiff testified positively that he informed Tuppela with reference to his nonadmission to practice in the courts of Alaska, and that he drew the contract with intent to show therein that he had the right to associate other counsel with him. (P. R. pp. 66 to 69.)

We submit that plaintiff's testimony on this point is convincingly truthful even though the defendants charge that plaintiff inveigled Tuppela into making a contract which was impossible for plaintiff to perform. (Brief of Plaintiffs in Error, p. 15). It may not be amiss at this time to point out that regardless of the misfortunes of age and illiteracy under which Tuppela may have been suffering, the defendants themselves held other beliefs in that connection not so very long before the trial of this particular action was had.

Te defendant Cobb testified, after his attention was called to testimony that he had given in the proceedings in the probate court in

which the defendant Winn was appointed guardian of Tuppela's person (P. R. p. 259), that so far as he knew and believed Tuppela was perfectly rational up to June 26 or 27, 1921, and that he had seemed so to be all the previous time he, Cobb, had known Tuppela prior to that time, and that Tuppela did not seem to be insane at all and that he stood cross-examination well in the Chichagoff Mining case and that his testimony was clear, and that he testified in English without an interpreter (P. R. pp. 260, 261 & 262); also that this old illiterate prospector signed the pleadings (Plaintiff's Exhibit No. 14, P. R. p. 337) without any interpreter, and that he, Tuppela, could understand English if it was spoken clearly to him. (P. R. p. 273). Tuppela himself apparently did not consider that he was entirely ignorant, as on December 29, 1920, he swore before the defendant Cobb that "It is true that in May, 1919, about the time of my return to Juneau, Henry Lepisto, without any suggestion from me, but as I understood it, at the request of Judge Winn, attempted to interpret for me in stating my case to Mr. Cobb, but he was utterly unable to do so because of his ignorance of the English language. Such interpretation was thought necessary at the time, not because I could not express myself in English but because of an impediment in my speech due to the loss of my front teeth and my inability to enunciate distinctly." (P. R. pp. 193 & 194.)

The witness J. J. Barrett on cross-examination stated that Tuppela could speak the English language fairly well (P. R. p. 219).

The witness Moilanen testified that he explained the contract between plaintiff and Tuppela, to Tuppela, in the Finnish language (P. R. pp. 202 & 203).

The plaintiff himself testified that at the time of the execution of this contract it was read to Tuppela in both the Finnish and English languages and that Moilanen acted as interpreter (P. R. p. 66).

While untoubtedly it is a well established rule that the confidence reposed in counsel is personal and cannot be delegated to another without the client's consent, yet we do not understand that this rule is any different from any other rule in that there can be no exceptions to it. The evidence clearly shows that the contract itself provided, and that both the plaintiff and Tuppela understood, that the former would, or at least had the right to, employ associate counsel. Even if this were not true, in the case of a contract made in the State of Oregon, assuming that the services thereunder necessarily were to be performed in the Territory of Alaska, we submit that the distance between the two localities is such that it would be fairly inferred, without any specific authorization, that plaintiff had the power to delegate his authority to an attorney in the Territory

of Alaska, and not only to employ an associate but even a substitute attorney, so long as it was at his expense.

“But the general rule as to delegation of an attorney’s authority yields where the facts of a particular case are such that it may fairly be inferred that power to delegate his authority was given, and a distinction is to be observed between the authority of an attorney to employ a subordinate and his power to employ a substitute. While an attorney ordinarily has no implied authority by virtue of his employment to employ assistant or associate counsel at his client’s expense, and this is held to be true especially where the client does not know that the attorney was employed, or where it can not be said that he ought to know this fact, yet he may empower another attorney to appear for him, which appearance will bind his client, and where employed to conduct a case in another county he may employ local counsel to attend to formal matters connected with the court and charge the fees of such counsel as expenses if not in excess of what they would have been had the attorney of record attended to such matters in person.”

2... R. C. L. pp. 978 & 979.

Moreover, an attorney admitted to practice in the State of Oregon is not precluded from recovering damages for breach of a contract

covering services that might have been, or even that necessarily must have been, performed in the Territory of Alaska if the attorney had been permitted to carry out the contract, where such attorney informed his client that he was not admitted to practice in Alaska and that for any court proceedings in Alaska he would associate himself with another attorney.

There is nothing in this case on this score to prevent the plaintiff from recovering any more than there was to prevent the plaintiff from recovering under very similar facts arising in the State of Massachusetts and reported in *Brooks v. Volunteer Harbor*, No. 4, 123 N. E. (Mass.) 511.

See also: *National Bank v. Old Town Bank*, 112, Fed. 726.

To hold that the contract in question is void because the plaintiff was not admitted to practice law in the courts of Alaska, would be tantamount, we submit, to holding that no member of the bar in the city of San Francisco could contract with any client in that city relative to affairs that the client might have in the Territory of Alaska, because the settlement of such affairs might require a law suit in that territory and therefore he, the attorney, regardless of what services he might perform, could not obtain any compensation therefor because of his not being a member of the bar of Alaska. No attorney would dare risk giving advice to

ny client relative to any matter unless the matter were confined solely to the jurisdiction in which the attorney was admitted to practice.

Third.

The third proposition advanced by the Plaintiffs in Error is that the proof failed to show that Tuppela discharged the plaintiff. (Brief of Plaintiffs in Error, p. 12.)

There are many circumstances which, we submit, conclusively show that Tuppela did discharge the plaintiff unjustifiably. The evidence is clear that it was agreed between Tuppela and the plaintiff that Tuppela should go to Alaska and locate his witnesses and to send their names and addresses, as well as certain papers that he had left in Sitka, to the plaintiff so that the latter would be in position to present his claims to the Chichagoff Mining Company. (P. R. pp. 75, 76, 77, 83 & 84). These witnesses were later witnesses in the case of Tuppela against the Chichagoff Mining Company (P. R. pp. 250, 268 & 269); that after the plaintiff returned to his office in the fall of 1918 from a spell of sickness, he made inquiry of Mr. Nikula as to Tuppela, and, having received no letters from Tuppela, wrote him a letter in the Finnish language (P. R. p. 86) for the reason that that was the easiest language for Tuppela to read (P. R. p. 87), which said letter never returned (P. R. p. 87), in which he made inquiry as to whether Tuppela had located his witnesses and found

the papers that he was endeavoring to locate (P. R. p. 88); that the plaintiff wrote Tuppela again about March 1, 1919, and asked him whether or not it was true he had retained an attorney (P. R. p. 94), propounding that question to Tuppela because he had heard from a fisherman that Tuppela had retained another attorney (P. R. p. 96), and that in the summer of 1919 he received a letter from the defendant Cobb (Plaintiff's Exhibit No. 5, P. R. p. 97) stating that Tuppela had told him, Cobb, that he had left a lot of papers in March last with the plaintiff which were now needed and to send them either to Cobb or Tuppela; that this letter contained no information as to what business the defendant Cobb was in, and that thereupon the plaintiff again wrote to Tuppela and told him about receiving a letter from Cobb and told him, Tuppela, that he had never sent to the plaintiff the papers for which he went to Alaska, which letter was addressed to Juneau, Alaska (P. R. pp. 98 & 99).

It is significant that the defendant Cobb in writing to the plaintiff his letter of July 17, 1919, (Plaintiff's Exhibit No. 5) in no wise mentioned the contract between Tuppela and the plaintiff, nor made any inquiry as to the plaintiff's professional relationship to Tuppela although it is apparent from his testimony that Tuppela must have, to some extent at least, informed Cobb of his, Tuppela's, relationship to the plaintiff, inasmuch as Tuppela told Cobb

that he had turned all his papers over to plaintiff (P. R. p. 265), and furthermore, sometime during the transaction Cobb had a copy of this contract in his possession (P. R. p. 267), and knew that the plaintiff was an attorney and that he had been Tuppela's attorney and that he had had a contract with Tuppela (P. R. p. 266). We submit that no duty rested upon the plaintiff as a attorney to pursue Tuppela as a client and to haul the latter back into his office, and that he acted strictly according to professional ethics in his endeavors to ascertain what had become of his client, and that if any rules of professional ethics were violated, the breach was committed by the defendant Cobb who, knowing of the relationship between Tuppela and the plaintiff, failed to consult the plaintiff as to whether or not that relationship still existed. There is no evidence that Tuppela ever corresponded with plaintiff other than by the letter of the defendant Cobb on July 15, 1919, (Plaintiff's Exhibit No. 5) although Tuppela says himself that he made arrangements with J. R. Winn to represent him about the early part of January, 1919, (P. R. p. 193), which statement is further corroborated by the affidavit that he made on September 12, 1919, before the defendant Cobb, in which he stated "As soon as I reached Sitka I made inquiries and learned that the Chichagoff Mining Company was then claiming adversely to me through the deed of W. P. Mills * * * I refused to sign the paper or accept the money or any part of

it and as soon thereafter as I could, I consulted counsel and brought suit." (P. R. p. 360).

Neither is there any evidence that Tuppela ever consulted plaintiff as to employing either J. R. Winn or J. H. Cobb as associate counsel in the case, nor did either of them ever consult the plaintiff about their being employed in the case.

The case of *Brown v. Green*, 62 So., 154, as we understand it, simply holds, not that the circumstances therein set forth did not justify the attorney's abandonment of the client's case, but that it did not justify him in doing so without giving notice to the client.

In the case of *Welsh v. Shumway*, 65 Illinois 473, there was a delay on the attorney's part of approximately 3½ years and the proof required was of the simplest nature, and, moreover, the attorney was not prevented from acting by any act of the client. That case, we submit, in no wise supports the contention that Tuppela did not discharge the plaintiff. No contention will be made that the case of *Tuppela v. the Chichagoff Mining Company* was a simple case. The evidence of the defendant Cobb plainly indicates the contrary. (P. R. pp. 255 & 256).

While the mere fact of employment by the client of associate counsel may not be sufficient ground to justify an attorney in abandoning a case, yet we understand that it somewhat de-

pend upon the manner in which this is done. Tuppela's employment of additional counsel in Alaska, without consulting with or notifying plaintiff thereof, under a contract almost identical with the contract that Tuppela had theretofore made with the plaintiff (Plaintiff's Exhibits Nos. 3 — 15, P. R. pp. 333 & 349) and under which subsequent contract Tuppela agreed with the new attorneys that they should have one-half of the amount in money or property recovered, clearly indicates that Tuppela not only did but that he intended to, discharge plaintiff, and these facts go far beyond the scope of the language of the Illinois court when it said:

“Something depends on the manner in which such a thing is done, but in general it is a great advantage to have as associate, no matter how distinguished the attorney first retained may be, another no less distinguished.”

Morgan v. Roberts, 38 Ill. 65.

The rule stated by the New York court in the case cited by the defendants in their brief is:

“While a client has the undoubted right to employ any counsel he chooses, yet it is fair and proper, and professional etiquette requires, that he should consult the attorney and other counsel in the case so that they can withdraw, if for any reason they

do not desire to be associated with him."

Tenney v. Berger, 93 N. Y. 524, 45 Am. Rep. 263.

Tuppela thus not only unprofessionally discharged the plaintiff but justified plaintiff, if he saw fit, in withdrawing as the attorney for Tuppela. Tuppela having previously made a contract (Plaintiff's Exhibit No. 3) with plaintiff by which plaintiff's compensation was to be one-half of the amount recovered, it is impossible to believe that, when he made the subsequent contract with Winn and Cobb (Plaintiff's Exhibit No. 15), which provided that their compensation should be one-half of the amount recovered, he could have had any other idea than to discharge the plaintiff, as otherwise he had made contracts by which the full amount of the recovery was to be paid out as compensation. Moreover, Tuppela did all these things without any communication with the plaintiff. Defendants attempt to justify this on the ground that Tuppela was an old illiterate prospector but it is significant that although he told his new attorney, the defendant Cobb, about his contract with plaintiff and about the papers that he claimed to have left with plaintiff (P. R. p. 251), yet the defendant Cobb in writing to plaintiff (Plaintiff's Exhibit No. 5), entirely failed to make any statement about his employment as Tuppela's attorney, or inquiry about plaintiff's relationship with Tuppela. We submit that these facts are amply sufficient to

have justified the jury in finding that Tuppela discharged the plaintiff and that the breaking off of all communication alone would have been sufficient evidence on that score.

See *Dempsey v. Dorrance*, 132 S. W. 133.

Fourth.

The fourth proposition advanced by defendants and which they state is based on their first and fifth assignments of error, is that "the proof showed conclusively that plaintiff had been guilty of such negligence as fully justified Tuppela in discharging him as his attorney in any event." (Br. of Plaintiffs in Error, p. 12).

Under the third proposition, *supra*, we have discussed Tuppela's discharge of the plaintiff; hence, we shall endeavor to indulge in as little as possible useless repetition.

The evidence seems to us to clearly establish that the plaintiff was not only ready and willing but that he held himself in readiness to perform the contract with Tuppela and that he was prevented from carrying out the contract by the acts of Tuppela (P. R. pp. 70 to 112, p. 137, pp. 215, 216). So far as we recall, there is no evidence that Tuppela was ill in December, 1918, other than that of the plaintiff who testified: "But I had heard that he was sick with the flu in Tacoma. I traced that up and found out he wasn't there," (P. R. p. 129) but there is evidence that plaintiff himself was ill with the

flu in the fall of 1918 and got back to his office in the latter part of November (P. R. p. 86).

The plaintiff testified in regard to his practice of instituting lawsuits: "I wait for the proper time. When I have both the facts and the law in the case, then is when I take my steps," (P. R. p. 137). We submit that such is the practice of any conscientious lawyer and that there is nothing in the testimony of the witnesses Wickersham, Rustgard or Roden to the contrary. The witness Wickersham testified: "Every case stands upon the facts in that case; yes," in answer to the question: "Now, there may be circumstances where even a great deal more than thirty days could elapse and you wouldn't feel that the attorney had committed negligence, would you?" (P. R. p. 229). The witness Rustgard testified that a suit to recover mining claims in possession of a third party who may be developing them, should be brought "As soon as practically possible." (P. R. p. 230). The witness Roden testified that he wouldn't bring the suit until he got the facts together upon which to substantiate the case. (P. R. p. 238). Moreover, defendants cannot in good faith insist that the plaintiff committed negligence in not having instituted a suit within ninety days without conceding that negligence was committed in the actual bringing of the suit against the Chichagoff Mining Company as the evidence conclusively shows that more than ninety days elapsed after at least one of the

counsel were retained before that suit was actually brought. Plaintiff testified that: "I afterwards found out that he" (Tuppela) "had retained Winn in December, 1918." (P. R. p. 129). Tuppela himself on December 29, 1920, swore before the defendant Cobb that he, Tuppela, had retained J. R. Winn as his counsel about the early part of January, 1919 (P. R. p. 193). This same affidavit also clearly shows that this is the same J. R. Winn with whom the defendant Cobb was later associated as Tuppela's counsel. (P. R. p. 193). Tuppela's affidavit of September 12, 1919, sworn to before the defendant Cobb, might even lead one to believe that the date was earlier than the early part of January, 1919, (P. R. p. 360). The suit of Tuppela against the Chichagoff Mining Company was not instituted until May 10, 1919 (P. R. p. 223), and Tuppela requested leave afterwards to file an amended complaint which was filed on June 16, 1919 (P. R. p. 279). We do not mention these facts for the purpose of criticising Judge Winn as to the time taken in which to file the complaint, but simply to show that the period of time within which to bring a suit, that the defendants seek to urge against the plaintiff under the testimony of witnesses Wickersham, Rustgard and Roden, was over-run as a matter of fact by the Alaskan counsel who actually brought Tuppela's suit against the Chichagoff Mining Company.

The learned trial court specifically instruct-

ed the jury that there was no evidence of a formal discharge and left the determination thereof to be determined by the jury under the circumstances of the case. (P. R. p. 328). The circumstances which we have heretofore discussed under the third proposition, *supra* (See P. R. pp. 86—88, 97—99, 193, 253, 265, 266 & 360) were clearly such as to show a discharge, and that the learned trial court under the evidence of Tuppela's having entered into a practically similar contract with Messrs. Winn and Cobb (P. R. p. 30; p. 349) would have been warranted in instructing the jury that Tuppela did discharge the plaintiff, and that as a matter of fact there was evidence of a formal discharge.

The trial court also left to the jury the determination of whether or not the discharge if any, was justifiable. (P. R. p. 329).

Moreover, the instruction complained of by defendants (P. R. pp. 365 and 366; Bf. of Plaintiffs in Error, p. 12), was immediately followed by the instruction: "That the burden of proof is on the plaintiff to show the discharge, and first, that the same was wrongful and without sufficient cause." (P. R. pp. 330 & 331). The learned trial court had previously so instructed the jury, and also told the jury: "In desiding this question, you will consider that it is implied in every contract of the employment of an attorney that he will exercise ordinary skill, care, prudence and dispackth in attending to his

client's business; that is to say, the degree of skill, care, prudence and dispatch which a reputable lawyer exercise under the same or similar conditions. If he fails in this regard, I charge you that the client is justified in discharging him and the attorney cannot recover." (P. R. p. 316). The court also gave other instructions favorable to the defendants. (P. R. pp. 317, 318, 319 & 320).

The evidence clearly showed that Tuppela was sane from December 17, 1917, to June, 1921 (P. R. pp. 66, 193, 194, 202, 203, 219, 259—262, 273, 337), and the court so instructed the jury (P. R. p. 319).

We submit that not only was the plaintiff not guilty of any negligence, but furthermore, even if he had been, that it was incumbent upon the defendants to show that such negligence had caused Tuppela to suffer damages before he could maintain a defense thereon.

"To entitle himself to this defense, the client must show that he suffered damages consequent upon the attorney's negligence."

2 R. C. L. 1013, 1025;

Bank v. Ward, 100 U. S. 195,
25 Law Ed. 621, 622.

The case of Thorn v. Beard, 32 N. E. 140, is entirely inapplicable. The evidence clearly shows that the plaintiff advised Tuppela as to "What was best to be done in the matter" (P.

R. p. 64), and to locate his witnesses and papers and "that he should not enter into any negotiations with the Chichagoff Mining people or with Mills until he had consulted with me, and to sign no papers, as I believed they would naturally want to get in touch with him and want him to assign his rights in the property for a nominal sum." (P. R. p. 83), and Tuppela's affidavit, sworn to before the defendant Cobb on September 12, 1919, is plainly indicative of the fact that he, Tuppela, acted on the plaintiff's advice in refusing to accept the proceeds of the sale and sign a paper after he, Tuppela, reached Sitka in the fall of 1918. (P. R. p. 360).

Fifth.

The fifth proposition advanced by the defendants is that "plaintiff's remedy was a suit on quantum meruit for the value of the services rendered, and not for damages on the contract." (Br. of Plaintiffs in Error, p. 13).

We have no doubt of the power of a client to terminate the authority of his attorney, but we submit that this concession does not affect the rule that if a client does so and thereby breaches his contract with the attorney, he must respond for the breach, and that the power of a client to so terminate a contract with his attorney must be distinguished from his right to do so. We do not understand that there is any rule of law that goes to the extent of holding that a client may violate his contract

with his attorney and not be answerable therefor.

The facts in the Washington case of Ramey v. Graves, 191 Pac. 801, appears to us to be easily distinguishable from the facts in this case, as well as not in accord with the weight of authority. That case, if we correctly understand it, was contingent on the **successful prosecution of a suit**, and furthermore the successful action appears to have been actually prosecuted in the name of a third party, i. e., the maternal grandfather. The contract between Tuppela and the plaintiff was not necessarily dependent upon an actual suit (P. R. pp. 334 & 336).

In the case of Western Telegraph Co. v. Summers, 20 Atl. 129, there was nothing in the contract which interfered with the client's unlimited control over the litigation, and the controversy was compromised, so it was impossible to say whether or not the outcome of a suit would have been successful. In this case the suit was brought was successful, and we submit that under the law the presumption is that the suit would likewise have been successful if prosecuted by plaintiff as attorney.

In the case of Harris v. Root, 72 Pac. 429, there was a mutual abandonment of the contract, and the controversy was compromised and it was impossible to tell whether or not there would have been a successful conclusion if the suit had been prosecuted.

The weight of authority is that if a client discharges the attorney employed under a contract, such as the contract between Tuppela and the plaintiff, before that contract has been completed, such discharge is a breach of the contract.

Brodie v. Watkins, 33 Ark. 545, Am. Rep. 49;

Moyer v. Cantieny, 41 Minn. 242, 42 N. W. 1060;

Shevalier v. Doyle, 130 N. W. (Neb.) 417;

Dorshimer v. Herndon, 153 N. W. (Neb.) 496; 154 N. W. 207;

Scheinesohn v. Lemonek, 84 Ohio State 425, 95 N. E. 913.

The Supreme Court of Iowa has had occasion to express our contention in the following succinct language, to-wit:

“No contract of employment can prevent a client from dismissing one attorney and entering into a new arrangement with another. Such conduct may subject the client to liability to the attorney for damages for breach of contract, but cannot prevent his discharge and the consequent conversion of his claim into one of damages for breach of contract, instead of one for services rendered under an existing contract.”

Crosby v. Hatch, 155 Iowa 312, 316;
135 N. W. 1079;
2 R. C. L. 1048.

There seem to be three remedies open to the attorney under such circumstances, to-wit: (a) he may acquiesce in the breach and sue on a quantum meruit for the value of his services to the date thereof, or (b) he may wait until the end of the term, then sue for the agreed compensation, or (c) he may sue at once for damages.

In the Indiana case of French v. Cunningham, 49 N. E. 797, which case is cited by defendants, that court, at page 799 said:

“But whatever may be the rule as to other contracts, the rule as to contracts employing attorneys is as we have shown that if the same is broken by the client the attorney may recover on quantum meruit for the reasonable value of his services, or he may sue upon the contract, and recover damages for its breach.”

French v. Cunningham, 49 N. E. 799.

The court instructed the jury that the measure of damages was the amount of money that the plaintiff would have received had he been allowed to complete the terms of his contract, less the value of such services as would have been required to complete the contract and less such expenses as he would have been

compelled to incur in carrying out the contract (P. R. pp. 312 & 313).

We submit that these instruction were extremely favorable to the defendants, and that in fact they were more favorable than the defendants were entitled to under the law as they in effect permitted the jury to make deductions in mitigation of plaintiff's damages although there appears to have been neither pleading nor proof of such mitigation. It is a general rule of law that mitigation of damages under such circumstances must be pleaded and proved by the employer (Notes, pp. 107, 108 & 109, 6 L. R. A., N. S.). The instructions thus confined the damages to compensation for the actual work which the plaintiff performed, and thereby gave effect to the rule which defendants are contending for, i. e., that plaintiff was only entitled to compensation for the services rendered.

We submit that these instructions could be bona fidedly complained of only by the plaintiff and that under the rule announced by this court in *Kikuchi v. Ritchie*, 202 Fed. 857, the learned trial court would have been warranted in having given instruction much more favorable to the plaintiff and much less favorable to the defendants than the instructions actually given, and that the defendants under the instructions given received the benefit of mitigated damages which in fact they were not entitled to receive.

But regardless of any similarity or lack of similarity between the facts of this case and the facts of the cases cited by defendants, under the contract between plaintiff and Tuppela the real measure of damages was the agreed compensation, i. e., one-half of the amount recovered by Tuppela, which in this case must be admittedly at least one-half of \$300,000. It seems to us therefore that the defendants have little cause to complain of an instruction that permitted the damages to be measured, after deductions had been made, upon the actual services rendered instead of upon the actual agreed compensation in accordance with the correct rule as announced in:

Kikuchi v. Ritchie, 202, Fed. 857;

Moyer v. Cantieny, 42 N. W. 1060;

Barcus v. Gates, 130 Fed. 364, 369;
136 Fed. 184;

Carter v. Baldwin, 95 Cal. 475;
30 Pac. 595;

McBowan v. Parrish, 237 U. S. 285.
59 Law Ed. 956,
964;

Detroit v. Whittemore, 27 Mich. 281;

Scheinesohn v. Lemonek, 95 N. E. 913,
Am. Cases 1902 C737;

Webb v. Trescony, 76 Pac. 621,
18 Pac. 796;

Dorshimer v. Herndon, 153 N. W. (Neb.)
496,
154 N. W. (Neb.)
207.

and that the defendants were benefited and not injured by the instructions of which they complain.

Conclusion.

In conclusion we submit that the judgment of the trial court should be sustained as to both the second and third causes of action for the reason:

1st: That the defendant Cobb is not only a proper but a necessary party to the action, and, even were it otherwise, which we do not concede, defendants' objections thereto came too late and could not affect the validity of the judgment against his codefendants, and that justice would not be subserved by requiring plaintiff to bring a separate action against him to pay the judgment against the defendant Tupela.

2nd: That both the law and the evidence amply supports the judgment, and that the learned trial court committed no error to the prejudice of the defendants.

3rd: That there is no error whatsoever as-

signed to secure a reversal as to the third cause of action.

Respectfully submitted,

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